Shelby County Health Care Corporation d/b/a the Regional Medical Center at Memphis *and* Amelia Witzleb *and* Becky Wood. Cases 26–CA–21173, 26–CA–21244, and 26–CA–21404

October 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 31, 2004, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order dismissing the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Linda Mohns, Esq., for the General Counsel.
David P. Jaqua, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 26–CA–21173 was filed on April 7, 2003, and a first amended charge was filed on September 19, 2003, by Amelia Witzleb, an individual (Witzleb). On June 3, 2003, Witzleb filed the original charge in 26–CA–21244 and later filed a first amended charge on September 19, 2003. The charge in Case 26–CA–21404 was filed on October 3, 2003, by Becky Wood, an individual (Wood). Based upon the allegations contained in Cases 26–CA–21173, 26–CA–21244, and 26–CA–21404, the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued a second order consolidating cases, amended consolidated complaint and notice of hearing on November 26, 2003. The complaint alleges that the Shelby County Health Care Corporation d/b/a the Regional Medical Center at Memphis (the Respondent) terminated Witzleb on March 27, 2003, because she joined and supported Local 205 of the Service Employees International Union (the Union). The complaint further alleges that Respondent denied Wood 24 hours of paid sick leave because she gave testimony to the Board in the form of an affidavit and/or otherwise cooperated in a Board investigation. The complaint additionally includes seven other incidents of conduct that are alleged to interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act (the Act).

This case was tried in Memphis, Tennessee, on January 20, 21, 22, 23, and 30, 2004, at which time all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Tennessee corporation, with an office and place of business in Memphis, Tennessee, has been engaged in the operation of a hospital and associated clinics providing inpatient and outpatient medical care. While Respondent denies that it is an employer within the jurisdiction of the National Labor Relations Board, Respondent admits that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits that annually it derives gross revenues in excess of $250,000 and purchases and receives at its Memphis, Tennessee facility goods valued in excess of $5000 directly from points outside the State of Tennessee. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Although Respondent asserts in its answer that it is without knowledge as to whether the Union is a labor organization within the meaning of Section 2(5) of the Act.[1] I find the Union to be a labor organization.

[1] The parties excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Because we agree with the judge that the Respondent is exempt from the Board's jurisdiction because it is a political subdivision, we find it unnecessary to pass on the judge's alternative findings with respect to the alleged unfair labor practices.

[1] While the record contains no testamentary proof in support of this issue, the General Counsel submitted into evidence two fliers that were distributed by the Union to employees soliciting their support for the Union's representation of nurses at Respondent's facility. Sec. 2(5) of the Act defines "labor organization" as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Union's flyer discusses the Union's intention to seek better benefits, pay, and grievance procedures for Respondent's nurses through a collective-bargaining agreement. Based on the Board's and the Supreme Court's liberal interpretation of what constitutes a labor organization, there is no doubt that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *St. Anthony's Hospital*, 292 NLRB 1304 (1989).

II. JURISDICTION

Certainly, the pivotal issue for determination in this case is the issue of jurisdiction. Respondent submits that because it is a political subdivision, it is expressly excluded from the term "employer" within the meaning of Section 2(2) of the Act. General Counsel maintains that Respondent is an employer within the meaning of the Act and that the Board has jurisdiction in this matter.

A. Background and Relevant Facts Related to the Issue of Jurisdiction

Prior to 1981, the Memphis and Shelby County Hospital Authority existed pursuant to state statute and operated the city of Memphis Hospital, Oakville Hospital, and the Shelby County Healthcare Center. Oakville Hospital was a long-term critical care hospital for the indigent with long-term medical care needs and the Shelby County Healthcare Center was primarily a nursing home facility providing residential care for the indigent. Consistent with the other medical care facilities included in the Shelby County Hospital Authority; the city of Memphis Hospital was funded by appropriations as a part of the county budget. The employees were considered to be county employees with civil service protection and county employee benefits. The American Federation of State, County, and Municipal Employees (AFSCME) represented employees in all three facilities included in the Memphis and Shelby County authority.

On June 15, 1981, the board of county commissioners of Shelby County, Tennessee, passed a resolution to dissolve the Memphis and Shelby County Hospital authority. In its resolution, the commission further resolved that such action was contingent upon the formation of a not-for-profit corporation to be named Shelby County Health Care Corporation (Respondent and also referenced as "The MED") and the execution of a contract between the Shelby County Government and Respondent for the operation of the facilities then operated by the Memphis and Shelby County Hospital authority.[2] County Attorney Brian Kuhn testified that the Shelby County Hospital authority was dissolved in conjunction with the county's issuance of 40 million dollars in bonds for the modernization and the construction of new buildings for the city of Memphis Hospital. The county determined that in order to attract paying customers and to keep the hospital afloat, the city of Memphis Hospital needed a new image and needed to look less like a Government hospital.[3] By separate resolution on June 15, 1981, the Shelby County commissioners approved Respondent's incorporation. The incorporating charter provided for 10 directors who were to be appointed by the mayor of Shelby County, Tennessee. The charter required the mayor to appoint the administrator of the hospital as one of the directors who would be an ex officio director with no vote and counted for quorum purposes only. The charter was later amended on July 9, 1981, to provide that 9 of the 10 members recommended by the mayor were subject to concurrence of the board of county commissions and to set the voting directors' terms of office. By resolution of June 22, 1981, the county approved the appointment and length of term for those directors who were to be nominated by the mayor. In 1985, the charter was further amended to provide for 12 regular voting directors to be appointed by the mayor and one nonvoting ex officio member. On March 27, 1986, the charter was further amended to designate the hospital administrator, hospital medical director, and the president of the medical staff as ex-officio non-voting directors.

On July 1, 1981, Respondent and the county entered into a lease agreement for Respondent to operate a hospital providing comprehensive health care services to needy Shelby County residents regardless of their financial status. The lease provided that for $1 per year and other valuable consideration, the county would lease to Respondent all of the land and improvements that were known as the city of Memphis Hospital, including the new hospital under construction. The lease set forth the parties' understanding that Respondent was neither an agency of the county nor any other Government agency and that the lease was not made pursuant to the State statute that had created the Memphis Hospital authority. A condition of the lease was the requirement that the number and method of selection of directors conform to the 1981 charter and articles of amendment. An additional provision gave the county the option to terminate the lease in the event that the number and method of selection of directors changed. Pursuant to this lease, Respondent was required to file with the county an annual operations financial report and a budget for the next year's operations including anticipated capital expenditures. Respondent was required to annually submit a copy of a certified audit to the county. The lease further required: "The annual budget shall be subject to the approval of the county, and the county board of commissioners shall determine the amount of appropriations to be provided to SCHCC to fund the budget as approved." On July 1, 1981, the county mayor signed a resolution approving the contract between the county and Respondent. The resolution included the proviso that the approval of the lease was contingent upon the county receiving an agreement from the city of Memphis that the city of Memphis would continue to make payments to the Shelby County Government for utilities in lieu of tax payment as had been the practice with the Memphis and Shelby County Hospital authority. The approval of the lease was further contingent upon the county's ability to use Federal revenue sharing funds for Respondent's operation of the city of Memphis Hospital. To date, the county continues to remain the landowner of Respondent's facilities. Respondent is specifically not permitted to sublet the lease and all of the real and personal property is titled in the name of Shelby County Government.

The lease agreement, as well as Respondent's corporate charter and Respondent's 1994 revised bylaws, require that the meetings of Respondent's board of directors be subject to the Tennessee open meetings act or (Sunshine Law). The lease agreement also requires Respondent to make the hospital avail-

[2] Although the Memphis and Shelby County Hospital authority also included the Shelby County Health Care Center and the Oakville Health Care Center, these two facilities were not designated for Respondent's operation.

[3] Prior to that time, the hospital primarily treated the indigent of Memphis in 40 to 50 bed wards.

able to all Shelby County residents who are in need regardless of their financial status.

Kuhn testified that each year the county adopts an operations budget as well as a capital improvement budget. When the county adopts the operating budget for the upcoming year, the county also appropriates the necessary funds to accommodate the budget and to fund Respondent. Kuhn explained that the operating budget is funded predominantly by "fees, taxes, and property taxes." Kuhn testified that the county has continued to issue bonds and assume the obligation of capital improvements for the facility leased to Respondent. As an example of the county's financial responsibility for the facility, Respondent submitted into evidence the county's July 1991 resolution to appropriate $10 million for Respondent's capital improvement needs. In June 1991, the county passed a resolution to amend the 1990–1991 fiscal year operations budget of $24,566,667 by an increase of $2,233,333. In 1994, the commission appropriated $16,584,000 from the 1993–1994 fiscal year capital improvement budget for the completion of the ambulatory care facility, the purchase of radiology equipment, and the expansion of the radiology and labor and delivery facilities. Respondent's June 30, 2003 and 2002 financial statement reflects that the county appropriated $23 million in 2002 and in 2003 to partially offset the costs of medical care for indigent residents of the county. Appropriations from the county for capital improvements for 2003 and 2000 were approximately $11.4 million and $4.5 million, respectively.

While the county allocates an amount for Respondent's annual budget, the allocation may be paid monthly if the county's cash funds are low. Kuhn recalled previous occasions when the county commission had issues with Respondent or the University of Tennessee physicians who staff the hospital and the commission required Respondent to report back to the county every 2 months. In those instances, the county legislatively appropriated funding to Respondent on a month-to-month basis because of the political or public issue with which they were dealing. While the mayor does not have a line item veto for specific items in Respondent's budget, he has a line item veto over the portion of the Shelby County budget that provides the funding for Respondent's budget.

On April 6, 1982, Respondent applied for exemption from Federal income tax pursuant to Section 501(c)(3) of the internal revenue code. Section 5 of the application inquires as to whether the applying organization controls or is controlled by any other organization. In response, Respondent stated: "The Shelby County Government in effect controls the organization through its power to appoint the directors of the organization. The organization replaces the Memphis and Shelby County Hospital Authority, Inc. as the operating entity for the City of Memphis Hospital." By letter dated August 23, 1982, Respondent was notified of its tax-exempt status for Federal income tax under 501(c)(3) of the internal revenue code.

On October 3, 1986, County Attorney Kuhn provided a written opinion to the county's chief administrative officer on the ramification of Respondent's board in refusing to appear before the county commission. County attorney Kuhn noted that there was no duty set out in the instruments creating Respondent that mandatorily requires Respondent's board members to appear before the county commission committee when requested to do so. He went on to add however, should the board members refuse to do so, the mayor and the county commission have three methods of recourse available. The mayor and the commission could limit or decrease the deficit funding to Respondent due to the fact that the appropriation of funds is a discretionary matter. Secondly, the mayor and the county commission can institute proceedings for the removal of board members if this refusal is deemed to be justification for removal for "cause." Thirdly, under the terms of the lease agreement, the county may terminate the lease upon 6 months written notice without cause and take over the operation of the hospital as a county entity. In his written opinion, County Attorney Kuhn pointed out that the provisions in the bylaws and charter that deal with the creation of Respondent's board of directors "clearly indicates that it is a quasi-governmental board."

Respondent's revised bylaws of December 11, 1992, reiterated that the board of directors would consist of 12 regular directors, plus 3 ex-officio directors. The bylaws provided: "The regular directors shall be appointed by the Mayor of Shelby County, Tennessee, subject to the approval by the board of commissioners of Shelby County. A majority of the directors shall be residents of Shelby County, Tennessee." The bylaws further provided that in the event of a board vacancy, the chairman should submit names of prospective board members to the mayor based upon the recommendations of the nominating committee, or the full board. The bylaws provided that the mayor may consider the candidate but the appointment of the successor to fill the vacancy shall be made by the mayor of Shelby County in his sole discretion, subject to the approval of the board of commissions of Shelby County. Kuhn testified that he could not recall any instances when the mayor or the county commission removed a member of the board. He recalled however, that the mayor and the county commission have denied reappointment of board members.

In previous years, the county commission has raised staffing issues with Respondent while approving Respondent's budget. Kuhn explained that the county's approval of Respondent's budget was a "pretty big stick" because of the degree of deficit funding involved. Kuhn recalled that on one occasion during the mid-1980s, the county sent him to Respondent to review financial records when the county administration discovered that there were a large number of uncollected bills that increased the amount of the deficit funding. Occasionally county administrative officials have appeared at Respondent's board meetings to address issues concerning the hospital's operation. Kuhn also recalled that at one time, one of the commissioner's raised concerns about the length of time that patients were waiting to be seen in one of Respondent's outpatient clinics. While Kuhn could not recall all of the details of the county's response to their dissatisfaction, he explained that it was not unusual for the county to pass resolutions directing Respondent to take certain actions. Although Kuhn could not recall the full details, the record contains a November 1991 resolution in which the county commission requested an investigation of excessive waiting time for patients at Respondent's Gailor Clinic and the emergency room. The commission further resolved that the hospital and health committee be empowered to utilize the ser-

vices of the county commission's internal auditor to compile information needed to complete what the commission described as "this much needed and long overdue investigation."

On December 5, 1994, the county commissioner's session was attended by AFSCME's attorney, and its Washington, D.C. representative, as well as a representative of the Memphis Ministers' Association, a State Representative, and a number of Respondent's employees. Both the AFSCME's attorney and others present at the meeting asked the county to urge Respondent to hold a fair election to resolve the issue of employee union representation. After discussion and consideration of the request, the county commission passed a resolution "urging The MED to proceed expeditiously to hold an election to resolve the issue of employee union representation." In 1995, after a breakdown in contract negotiations, Respondent withdrew its recognition of AFSCME's representation of its nonprofessional employees. Mary Whitaker, Respondent's vice president of legal affairs, testified that county leadership directed Respondent to mediate the dispute with the Union and to "get a contract" with the Union. Mayor Jim Rout appointed Attorney Arnold Pearl to serve as mediator between Respondent and AFSCME. Whitaker, who was corporate legal counsel at the time, testified that the county gave Respondent no option or discretion as to whether it would enter into a contract or memorandum of understanding with AFSCME. Respondent's agreement with the AFSCME remains in effect.

Whitaker testified that Respondent experienced a major financial crisis in 1995 when Respondent lost $42 million resulting from the State's conversion from Medicaid to Tenn-Care. The mayor appointed Nancy Lawhead as his special assistant for health policy to deal with these issues. Respondent submitted into evidence Respondent's board meeting minutes for June 4, 1996, March 31 and July 2, 1997, and September 15 and November 8, 2000 reflecting Lawhead's attendance. During the June 4, 1996 board meeting, Board Chairman Lewis Donelson expressed some concerns about the viability of Respondent and stressed the need for possible affiliation with another hospital or system in order to survive. He also added that the mayor's advisory committee had concluded that Respondent is a major asset to the community and must be preserved. During the July 2, 1997 board meeting, Board Member Waller reminded the board that the Respondent is an active participant in the planning process initiated by Shelby County Government supporting the integration of all county-funded providers of affiliated and direct health care services. The activities were under the auspices of the mayor's advisory council on health policy and chaired by Respondent's board member Barbara Holden. During the September 15, 2000 meeting, Chairman Donelson discussed proposed consolidation with other health care providers. Donelson assured all present however, that the board had no intention of implementing any of the proposed consolidation/moves without the approval of both the mayor and the county commission.

Respondent's employees who were previously employed by the Memphis and Shelby County housing authority have continued to participate in the county's pension and benefits plan. Those employees hired after Respondent's incorporation are not covered by the county's pension and benefits plan. Respondent is not required to follow the county's purchasing procedures, bidding guidelines, or the county's job posting requirements. Kuhn testified that Respondent maintains its own general liability and medical malpractice insurance policies separate from the county.

On May 21, 2003, the General Assembly of the State of Tennessee amended Tennessee Code Annotated; Section 29-20-102, relating to the Tennessee Governmental Tort Liability Act. Through this amendment, the provisions of the Governmental Tort Liability Act were extended to Respondent as a nonprofit public benefit corporation operating a hospital whose voting board of directors (or governing body) is appointed, designated, or elected by one or more designated Governmental entities and which hospital corporation either receives funds appropriated by a county legislative body or legislative body of a municipality; or receives or leases hospital real property from a county and/or municipality. The amendment further provided that such hospital corporation would be subject to the state's open meetings law and the open records law to the extent that other local Government hospitals and Government hospital authorities are subject to such laws.

Under the lease agreement with the county, Respondent is required to have a public audit. The independent audit dated December 1, 2003,[44] reflects the audit of "the consolidated balance sheets of "Shelby County Health Care Corporation, a component unit of Shelby County, Tennessee (d/b/a The Regional Medical Center at Memphis) and subsidiaries as of June 30, 2003 and 2002 and the related consolidated statements of operations, changes in net assets, and cash flow for the years then ended."

Whitaker testified that the Federal agency that was formerly known as Health Care Financing Administration (HCFA) and now known as CMS has treated Respondent as a public entity by allowing Respondent to make "intergovernmental" transfers to the State of Tennessee as a transfer from a unit of Government within a State. Respondent's expenditures were counted as those of the State of Tennessee for purposes of obtaining Federal matching funds. Whitaker further testified that CMS is now using what is called "certified public expenditures," which permits Respondent's losses from charity care, bad debt, treatment of medically indigent persons, and losses from Medicaid to be considered to be State losses and thus entitled to a Federal match. Whitaker testified that only public entities could have a certified public expenditure.

[4] Respondent's consolidated financial statements for the years ended June 30, 2003 and 2002 reference the 1996 clarification and definition of a Governmental organization for accounting purposes by the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB). The document includes the language that because the mayor appoints the board members subject to county commission approval, and the county allocates funds to Respondent for indigent care, Respondent qualifies as a component unit of the county for accounting purposes and thus Respondent has to apply accounting principles generally accepted in the United States of America applicable to state and local Government entities.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As nursing director for all operating rooms at Respondent's facility, Linda Duncan is responsible for nursing personnel in all of Respondent's operating rooms including those areas known as Chandler, the burn center, ambulatory surgery, emergency, as well as the trauma operating room (TOR). Susan Raburn is the nurse manager for the Chandler operating room, the burn operating room, and the TOR. For the past 3 years, Linda Pulley has served as the patient care coordinator for the TOR and supervises all the TOR registered nurses (RN's).

There are approximately 24 to 28 TOR registered nurses or RN's. Unlike other departments in the hospital, RN's working in the TOR normally work two 24-hour-shifts per week, followed by a 24-hour shift and 12-hour shift the following week. Respondent's staffing guidelines require a minimum of six RN's for each shift to cover the TOR's three operational operating rooms (OR's). Multiple medical services perform surgeries in the TOR. Prior to surgery, the medical specialty surgeon books the case through the charge nurse and completes a posting card identifying (1) time of the scheduled surgery, (2) the identity of the staff performing the surgery, and (3) any additional or specialty instruments that will be needed for the surgery. As Respondent is a teaching hospital, the surgeons are University of Tennessee Medical School residents. The general surgery physicians, who are also known as "surgery A" for each shift, determine whether a case will go to surgery and the order in which the surgeries will be performed.

Linda Pulley (Pulley) acts as charge nurse when she is present at the hospital. She designates a charge nurse in her absence. On each shift there are three TOR teams normally consisting of two nurses and a nurse anesthetist assigned to each operating room. One nurse functions as scrub nurse and the other nurse is designated as the circulating nurse or circulator. Because the scrub nurse cannot leave the operating room (OR), only a circulator can be designated as charge nurse in Pulley's absence. As each operating team completes a case, the team is reassigned to the next case designated for surgery. Witzleb testified that previously the TOR was designated for only trauma surgery. In recent years however, the TOR has also performed elective surgeries that were previously handled only by Chandler OR. While nurses in Chandler OR are given scheduled breaks and lunch periods, the TOR nurses have no specified lunch or break periods. If a case continues for longer than 4 hours, the assigned nursing team has the option of requesting relief on that case if there are other nurses available and not already assigned to cases in the other operating rooms. Even if a nurse requests relief after 4 hours of surgery, he or she may be required to immediately begin another case if all three operating rooms are needed for surgery.

B. Operating Room Stresses and Staff Behavior

Rita Kimmons testified that the TOR is very stressful at times. In describing the atmosphere, she explained "one minute the place can be quiet and the next minute they can have three operating rooms running with three patients on the table and all dying at the same time." Unlike the elective surgery OR, the TOR is "life and death." Kimmons described the mood of the OR during the part of the case with the greatest intensity. She explained:

> Everybody is very focused in on what they're doing. Everybody's yelling, you know, you can have anesthesia yelling for blood, the doctors getting upset because they don't think the scrub nurse is passing an instrument fast enough, the poor circulator is in and out of the room trying to take care of anesthesia's needs, the doctor's needs, the scrub nurse's needs. So it is a very hectic scene going on.

In describing the stressful work situation, Becky Wood explained:

> We may be sitting down to eat in the lounge and within 5 minutes you may be back scrubbed on someone with a knife in their heart, or a gunshot wound to the heart with their chest open. I mean that you have to be ready to go at any moment.

Nurse Susan Engel testified that TOR is a very stressful environment because the TOR receives traumas from all over the mid-South and the facility runs three operating rooms for 24 hours a day for 365 days a year. Engel explained that in response to the stress, voices are sometimes raised, tempers flare, and individuals may yell. She testified "people get a little hyper when somebody's dying and they're running back trying to save them."

C. Witzleb's Union Activity and Respondent's Response to the Union Activity

In approximately June 2002, Local 205 of the Service Employees International Union, Tennessee Health Care and Public Service Workers Union (Union) began organizing efforts among Respondent's nurses at Respondent's Memphis, Tennessee facility. Witzleb not only served as a union committee member, she also solicited union cards, distributed union literature, and participated in telephone solicitations for the Union. During the latter part of August 2002, the Union distributed a handbill containing the signatures of nurses who supported the Union. Witzleb's signature was included on the handbill. In late August or early September, the Union distributed another handbill displaying the pictures of five individual nurses and a statement from each nurse as to why she supported a union. Witzleb's picture and testamentary was included in the handbill.

Becky Wood testified that she first became aware of the union handbill containing the nurses' signatures when she observed anesthesia employee Kerry Snyder and Dr. Martin A. Croce, Respondent's chief of trauma and critical care (Croce), reading the handbill in the anesthesia workroom. When Snyder asked Croce what he thought about the handbill, Croce stated, "These names will be forever emblazoned in my mind."

On August 22, 2003, Croce issued a memorandum to the TOR nursing staff. In his memo, Croce acknowledged the Union's attempt to "infiltrate" the hospital. He stated: "Although my philosophy is quite liberal, *I adamantly oppose* [Emphasis added in text] a union of nurses-arguably the most important of health care professionals." Croce implored the nurses to "ignore propaganda and lies that may be spread by the

Union advocates." He assured the nurses that he was continuing to work with hospital administration to help solve existing problems. In the last paragraph of the memorandum he stated:

> Finally, I know that the TOR is a difficult place to work. Patients are very ill, families can be demanding, and the cases never seem to end. I know you don't do it for the money. I sure don't. However, the rewards are immeasurable—remember your feelings the last time a patient who arrived near death was quickly resuscitated, had a laparotomy with packing and towel clips and survived? Even when three rooms were running? That patient would have been dead at another hospital. Those feelings cannot be put into words. For those who are not interested in working hard or truly making a difference in patients' lives—the MED may not be the place for you. For all of you who wish to continue your dream of service to those less fortunate and move forward with hard work, cooperation, professional attitudes, and loyalty to patients—thank you for your support.

Witzleb recalled that on or about August 24, 2002, Dr. Bruce Steinhauer, Respondent's president and chief executive officer, Steinhauer, conducted a meeting with approximately 14 TOR nurses. The meeting occurred at approximately 6:30 a.m. on a Saturday and was attended by Gloria Thomas, Respondent's vice president of human resources. During the meeting, Steinhauer told the nurses that he did not think that they needed a union and he also asked about their concerns and allowed them to ask questions. Witzleb recalled that she came to the meeting with a four-page list of questions to cover with him. On September 19, 2002, Steinhauer, Raburn, Duncan, and Rhonda Nelson, vice president patient care services, issued a memorandum to the staff of trauma OR and the trauma recovery room. The memo began with the following:

> During the week of August 19, 2002, we had the opportunity to meet with some of the TOR staff. During that session, we identified opportunities to improve communication and to provide feedback related to your concerns. Listed below are some of the issues you mentioned and the actions that have been taken.

The memo continued with management's response concerning six separate issues. While management confirmed that there was no way in which to provide Shelby County benefits to employees or to expand the bathroom facilities, management confirmed that an outside contractor had been obtained to assess the entire air handling system, a TOR/TPACU representative had been added to the staff nurse advisory council, and a followup meeting had been held to resolve the staff's concerns about the weight and moisture of the metal instrument containers.

On September 25, 2002, Witzleb sent a letter in followup to the August 24 meeting. In the letter, Witzleb stated that it had come to her attention that one of the staff doctors was of the opinion that she had been "rude" and/or "mean" to Steinhauer during the August 24 meeting. Witzleb added that it was her understanding that this particular doctor had labeled her and at least one other nurse in their department as "troublemakers." Witzleb apologized if she had come across as "rude" or if it appeared that she was trying to be "mean." She explained that she had attempted to relate to him some of the current issues and concerns of the staff nurses. She went on to explain that she would not apologize for being a "troublemaker" if being a troublemaker involved refusing "to stand by and watch an injustice," refusing to "back down" when one's "principles of truth and human decency are challenged," and refusing to "stop complaining until wrong situations are rectified in the work place." She also stated: "If a 'troublemaker' is someone who is passionate when it comes to fighting social inequities, then here I stand."

In the summer of 2002, Rosemary Loftis worked in Respondent's burn OR, which is located on the same floor as the TOR. While she could not identify the exact date, she recalled seeing pamphlets concerning the Union's organizing efforts. She also recalled that she had been asked to sign "a petition for the hospital to say that we didn't want a union in there." Loftis recalled that on an unspecified date during the summer of 2002, she attended a staff meeting in her work area conducted by Raburn and Patient Care Coordinator Barbara Patrick. While the other nurses had already left the meeting area, she and a fellow employee Melissa Wellborn remained in the recovery room where the meeting had been held. Raburn and Patrick returned to the recovery room accompanied by another woman wearing nursing scrubs. Raburn explained that the woman wanted to speak with Loftis and Wellborn. Raburn and Patrick remained in the room. Loftis testified that the woman might have identified herself as working in the newborn center. Loftis recalled that the woman stated "they were putting a petition together for the people that wanted to not have a union in the hospital and would we like to sign it." After Wellborn declined to sign the petition, the woman left the area.

Nurse Susan Capozzi-Vazquez testified that in August or September 2002, there had been "something" posted in the TOR for employees to sign and to show their support for the "hospital and not for the Union." The petition was posted on Pulley's door as well as on one of the bulletin boards in the lounge. While nurse Engel recalled seeing the petition posted on the bulletin board in the lounge, she could not remember any of the signatures contained on the petition. Capozzi-Vazquez testified that because the petition contained names that she did not recognize, she asked Pulley about the petition. Both Pulley and Capozzi-Vazquez were in the lounge together at the time of Capozzi-Vazquez' inquiry. Pulley responded by stating: "You need to sign that." Capozzi-Vazquez recalled that one of the signatures on the petition was nurse Hester Moore.

Pulley denied having any conversation with Capozzi-Vazquez about the petition. She admitted however, that the petition had been posted on her door. Pulley recalled that she and Raburn were talking in her office when employee LaDorris Knowles came into the unit. Knowles asked if she could post a petition for employees to sign: "stating they did not want the union." When Knowles asked if she could post it on Pulley's door, Raburn stated: "that's fine." Pulley asserted that at the time that the petition was posted on her door, the bulletin board contained union handbills.

Steinhauer, Nelson, and Chief Operating Officer Brenita Crawford issued a memorandum to all registered nurses on

November 26, 2002. The memorandum included a resolution by Respondent's board of directors that Respondent would not recognize union representation of registered nurses at Respondent's facility through informal or any other means. In the memo, the management representatives explained that this decision meant that there would be "no counting of cards, election process, or recognition of a union for nurses." Management further explained that this decision was based in part upon the board of directors' belief that Respondent is not covered by the National Labor Relations Act and there being no Tennessee law requiring Respondent to recognize and deal with a union for registered nurses.

D. Witzleb's Discharge

As an insulin-dependent diabetic for 4 years, Witzleb must keep a frequent check on her blood sugar and take insulin to control her blood sugar. Although she has used an insulin pump to administer the insulin for the past year, she must still monitor her blood sugar. If Witzleb takes too much insulin, she may have an insulin reaction or if she does not take enough insulin, her elevated blood sugar may cause drowsiness or a diabetic coma.

Witzleb clocked in prior to 6:45 a.m. on February 15, 2003. The first case to which she was assigned was a gunshot-head-wound victim and the patient went into the operating room at approximately 7:05 a.m. As the surgery was expected to be a routine craniotomy, the operating room was initially booked for only 3 hours. Before 9 a.m. however, the projected time for surgery was extended to 6 to 7 hours. As circulating nurse, Witzleb informed charge nurse Hester Moore that her team wanted the 4-hour relief. Although Witzleb's team anticipated relief after their first 4 hours, the third operating team began a procedure around 10 a.m. Around 12:05 p.m., Witzleb spoke with Charge Nurse Moore. She told Moore that one of the other teams was getting ready to close their surgery and she asked if Moore wanted the finishing team to take a lunchbreak and then relieve Witzleb's team. Moore agreed but added only as long as surgery A did not want to continue to keep running three operating rooms. Witzleb recalled that she responded "I really don't give a shit what Surgery A wants to do. I need to check my blood sugar, take some insulin, and eat something before I do another elective case or I can go home." As Witzleb walked out the door, she heard Moore state: "Well, I guess you'll need to talk to Dr. Fabian about that." Witzleb testified that Moore's last statement made her angry and she came back into the room. Witzleb acknowledged that she was sure that she raised her voice and she told Moore that she didn't have a problem speaking with Dr. Fabian. She added that she would be more than happy to talk with him. Before walking out the door, Witzleb added that when she finished talking with him, he could call her endocrinologist and explain to her why Witzleb couldn't get her blood sugar under control. Witzleb testified that operating team number two finally relieved her team around 1:30 p.m.

Dr. Linda Hill is an assistant professor and associate program director of the nursing and seizure program. She is also employed by the UT Medical Group in the department of anesthesiology as a part-time staff nurse to provide anesthesia services at Respondent's trauma center. Hill estimated that she normally works anywhere from three to five 24-hour shifts during the month in the TOR. Hill was working with Moore's operating room team on February 15. Hill recalled that Witzleb came into the operating room and asked Moore something about taking lunch because she needed to eat. Hill could not recall the specifics but remembered that there was some discussion about another case that the physicians wanted to start. Hill testified that Witzleb was extremely upset because she was not going to be able to get relief and something to eat. Witzleb talked about her diabetes and her need to eat and to check her blood sugar. Hill recalled that there was an exchange of words and there was cursing. Hill never reported the incident to any of the nurse managers or the physicians. Hill explained that she had not reported the incident because she had not considered it to be a "reportable" incident or something that was appropriate to report. Hill testified that she had previously witnessed occurrences when people have been agitated or angry and have used profanity or acted inappropriately because of the intense work environment. Hill testified that there had been no negative impact on the patient care or the surgical procedure. Hill confirmed that neither she nor the surgeons stopped their procedure during Witzleb's conversation with Moore.

Sometime in March, Pulley asked Hill about the incident and asked her what was said. Hill told Pulley that she remembered the incident but she could not recall exactly what was exchanged. Pulley did not ask Hill to prepare a statement nor did Hill prepare one on her own.

Following the incident on February 15, Witzleb worked another 24-hour shift and a 12-hour shift the following week. Although the 12-hour shift was a day shift from 7 a.m. to 7 p.m., no one in management said anything to her about the events of February 15. Because of her own scheduled surgery, Witzleb did not return to work again until March 27, 2003. Before being assigned to her first case that day, she was called into Duncan's office to meet with Duncan, Pulley, and Raburn. Duncan told Witzleb that several people had reported Witzleb's using profanity in the operating room. Witzleb responded "Well, if you're telling me that I've been reported by Hester Moore for using profanity in the O.R., that would be the pot calling the kettle black." Witzleb testified that during the course of the conversation she looked toward Pulley and then made the statement to Duncan: "I've told her this many times, and I'll tell you too, if you're going to continue to run this operating room[5] like an elective OR, you need to staff[6] it like one."

During the March 27 meeting, Witzleb mentioned that she had previously documented an employee's threatening employees with bodily harm and no action had been taken. Although Pulley acknowledged Witzleb's documentation of the previous incidents, Duncan, Pulley, and Raburn informed Witzleb that she was being suspended pending suspension. She was reminded of Respondent's confidentiality rule and cautioned not to discuss this action with any of her coworkers. Witzleb was informed that she could go to human resources and request a

[5] The transcript incorrectly substitutes the word "office."
[6] The transcript incorrectly substitutes the word "stamp."

review of her file. When Witzleb did so, she found only her evaluations over the past 16 years and no reports concerning the incident. Witzleb testified that during her 16-1/2 years of employment her prior discipline included only one verbal counseling for tardiness and one written reprimand for mislabeling specimens.

Duncan later telephoned Witzleb on March 31 and informed her that she was terminated. Later in the week, Witzleb received a written notification of her termination along with copies of incident reports by Hester, Pulley, and nurse Lynn Regester. Witzleb later filed a grievance concerning her discharge with Respondent's internal grievance procedure. The personnel action review committee that was designated to review Witzleb's discharge was composed of five management committee members. Management selected two members and Witzleb selected two members. The fifth committee member is selected by management to oversee the hearing and to act as a tiebreaker if needed. After hearing the evidence presented by Witzleb and management, the committee determined on July 30, 2003, that termination was too severe a punishment in the absence of any prior disciplinary warnings. Witzleb's termination was reduced to a final warning and Witzleb was reinstated.

E. Respondent's Evidence on Witzleb's Termination

Witzleb's termination notice dated March 31, 2003, includes the following explanation for her termination as:

> Violated Med Care Standards and Standards of Conduct as it relates to personal demeanor and insubordination, including: use of discourteous, profane, or loud language; disrespectful conduct or language toward or relating to a person acting in a supervisory capacity (Charge Nurse); Argumentative behavior in communicating with a person in a position of authority; Conduct or language that is derogatory or may undermine authority; or other conduct which signifies intentional disregard for, or unwillingness to submit to the authority of the hospital.

Hester Moore recalled that around noon on February 15 Witzleb came into the operating room where she was working as the circulating nurse. Witzleb explained that one of the other teams was close to finishing and that after eating lunch they would relieve Witzleb and her team. Moore confirmed that the arrangement would be fine with her as long as surgery A did not want to continue to operate three operating rooms. Moore testified that Witzleb responded that she didn't give a "shit" what surgery A said because she was going to eat or go home. When Moore told Witzleb that she would be glad for Witzleb to communicate this to Dr. Fabian, Witzleb responded by saying that she didn't give a "f—k" what he said and she was going to eat. Moore testified that Witzleb added that she would let Fabian call her endocrinologist and explain why she could not eat. Moore maintained that Witzleb declared that she was going to eat or go home. Moore asserted that during the exchange, everyone in the operating room looked up to see what was happening. Moore recalled that while Witzleb mentioned contacting her endocrinologist during the conversation, Witzleb had not mentioned anything about checking her blood sugar or about taking insulin.

Moore acknowledged that she is a personal friend of Pulley and she telephoned Pulley on Sunday, February 16. Moore explained that she had not called Pulley with the intention of "writing up" what occurred. She called Pulley simply to make her aware of what happened in the event that something was said to her by one of the surgeons or if complaints were brought to her. On Monday, February 17, or the first day that both Pulley and Moore were both back at work, Pulley typed a report of the February 15 incident. Moore testified that Pulley prepared the report because Moore did not have access to a typewriter.

Nurse Lynn Regester testified on behalf of Respondent concerning Witzleb's conversation with Moore. As the scrub nurse working with Moore, Regester was present in the room when Witzleb came in to talk with Moore. Regester recalled that Witzleb came into the room and told Moore that she needed relief and she needed to go to lunch. Moore told her that she would see to it that she would get lunch as long as surgery A had no problem. Regester recalled that Witzleb left the room and then burst back into the room and spoke with Moore in a loud voice. Regester testified that Witzleb told Moore that she would go home if she did not get lunch. Regester recalled Witzleb's saying that she would call Fabian and see why he had a problem with her getting lunch and that he could call her endocrinologist. Regester recalled that Witzleb used profanity and she recalled that the wording of the profanity was similar to "I don't give a shit what he says." Regester further testified that the physicians and the nurse anesthetist stopped, looked around, and commented on the interchange. Regester testified that on the morning after Moore's conversation with Witzleb, Moore wrote up her statement concerning the incident and asked Regester to prepare a statement as well. Regester declined to prepare a statement but agreed that she would sign Moore's if she believed it to be factually correct. She reviewed Moore's statement and signed it.

Linda Duncan, Respondent's director of surgical services, testified that she personally questioned Witzleb about the February 15, 2003 incident. While Duncan did not elaborate in her testimony about others in attendance, her March 27, 2003 meeting with Witzleb is documented in General Counsel's Exhibit 59 and reflects that Pulley and Rayburn were present with Duncan and Witzleb. Duncan testified that during the interview Witzleb acknowledged that Moore's comments made her angry and she had come back into the operating room and began to question Moore about her comments. Duncan testified that Witzleb admitted to her that she told Moore that she would not do another elective case and that she was going to eat her lunch or go home. Duncan also testified that Witzleb acknowledged telling Moore that she would call Dr. Fabian if she needed to do so and he could call her endocrinologist and explain to him why she couldn't get her lunchbreak when she needed it and why she couldn't keep her blood sugar under control. Duncan further testified:

> She stated that she could not recall whether or not she had used profanity. But she stated to me that she told the charge nurse, I will not do another elective case. I will get my lunch or I will go home. And then she said to me, I told the charge nurse that, I told Hester that, and I'd tell you that too.

When asked by Respondent's counsel how Duncan interpreted Witzleb's statement, she responded:

> I considered it to be insubordinate not only toward the charge nurse, when she said it to her, but also toward me during my interview with her. It was defiant. It was with disregard for authority.

Although Duncan confirmed that the decision was made to terminate Witzleb, she did not identify who made the decision. Both Pulley and Raburn were called as Respondent's witnesses. Neither individual was asked about Witzleb's alleged admissions during the March 27, 2003 interview.

F. General Counsel's Evidence of Disparity

Witzleb admitted that she had been angry during her discussion with Moore and that she used the word "shit" and she had spoken in a raised voice. Witzleb denies that she ever told Moore that she would not do another elective surgery before getting lunch. Witzleb testified that she told Moore that she needed to check her blood sugar, take some insulin, and eat something before she did another elective surgery. Witzleb admitted that she made the statement "or I can go home." Witzleb acknowledged that while she had been a "smart ass" in making such a statement, she had not seriously considered going home. Witzleb explained that she made the statement during her March 27 interview with Duncan that "I told her that, and I'll tell you the same thing too." Witzleb maintained, however, that this statement was a reiteration to Duncan of a previous statement to Pulley concerning elective surgeries in the TOR. Witzleb testified that she had simply repeated to Duncan her previous statement to Pulley that if the TOR continued to operate as an elective OR, it needed to be staffed like one with designated lunch and breaktime. In giving this opinion, she had looked toward Pulley stating: "I've told her this, and I'll tell you this too."

G. Profanity in the TOR

Moore testified that profanity does not offend her and that she uses profanity in the OR. She acknowledged that she has used the word "[f—k]" and she's sure that she has probably used it when a case has been scheduled. She further acknowledged that she has used the term "[f—k]" me with a red hot poker" and it is possible that she has used this expression in the presence of the medical residents when they are scheduling cases. Dr. Derange Boykin is a staff anesthesiologist employed by the UT Medical Group, Inc. He has worked in Respondent's TOR and Chandler OR for 12 years. He is responsible for supervising the nurse anesthetist and the anesthesiology medical residents in the Chandler O.R. Boykin testified that profanity is fairly common in the TOR. Boykin estimated that at least twice a week for the past 2 years, he has heard Moore use profanity. In front of Pulley, she has stated "We got to draw all of these '[f—kin]' Chandler cases again today, I guess we'll just get '[f—ked]' around again." Boykin testified that these kinds of comments are considered to be commonplace in the TOR and considered to be "venting" because of fatigue.

Boykin recalled an incident in July 2003 involving a nurse and the orthopedic residents who were doing an elective orthopedic case. The residents did not immediately come into the operating room after the patient was brought in for surgery. When they finally entered the room, the nurse told them "they better get their mother '[f—kin]' asses in the room" if they wanted to do the cases.

Nurse Jean Ashburn testified that cursing in the OR was common. When Ashburn has worked as a circulating nurse, other operating room personnel have said to her "Why are you still sitting there on your ass, get up and go get what I asked you for?" On more than one occasion when medical staff has complained that they need additional staff in the OR, Ashburn and other nurses have replied: "Well as soon as I can shit another nurse out in the corner, we'll get you another one in here." Ashburn also recalled a 2001 conversation between Senior Surgery Resident Chris Pollack and Pulley concerning the order of the cases. After the resident informed Pulley that he wanted a particular case to go next, he turned and walked down the hall away from her. Ashburn recalled that Pulley yelled at him and followed him into the trauma ICU. During their conversation, Pulley shook her finger in his face and told him "Well, you know, I'm trying to get these God damn cases done." Nurse Kimmons was also present during the conversation between Pulley and Pollack. Kimmons recalled that during the conversation, Pulley cursed Pollack, shook her finger in his face, and became louder and louder. During the interchange, the patient who was scheduled for surgery was waiting in the hall and was conscious to overhear the entire conversation.

Nurse Susan Engel recalled that on one occasion, the medical resident performing surgery began a case before notifying Croce. When Croce arrived in the TOR, the staff explained that the surgery had been posted for a specific time. Croce responded with a raised voice: "Since when does a fucking case get started on time around here?" Engel testified that his comment was not in jest as he continued by telling them; "You should have notified me. I didn't know this case was going now."

Nurse Kristina Johnson testified that profanity was used on a regular basis in the TOR. Johnson has used profanity in Pulley's presence and she has heard Pulley use profanity as often as two or three times each day.

Wood testified that it is rare for profanity not to be used in the operating room. When asked to give an example, she explained:

> [I]f you have a patient who needs blood, and [the] blood bank says the blood's not ready, you know anesthesia may scream at you, "call the '[f—kin]' blood bank and see if the blood's ready yet, or tell the '[f—kin]' clerk—call the blood bank and we need to know what the '[f—kin]', you know it's just everyone. The surgeons may [be] screaming for it, using the same language.

Wood went on to explain that anesthesia may use the same language and she described it as "just sort of a language between family members" and not uncommon.

Nurse Sheryl Jones recalled an incident in March or April 2002 when Wood was charge nurse. Jones initially understood that she was to go into surgery to give the 4-hour relief to Veronica Castillo and her partner, Becky Lastor. As she was scrubbing up to go into surgery, she was then told that Castillo

did not want relief. When Jones was later called into Pulley's office to speak with Pulley and Duncan, she learned that Wood had accused her of refusing to give Castillo relief. When she denied the refusal to provide relief, Wood was called into the office. During the conversation, Wood began cursing and stating that she "didn't give a [f—k]." Jones recalled that Wood used the term "[f—k] you" or "[f—k] it" at least two or three times during the conversation with Pulley and Duncan. Jones responded by asking Wood if such language was necessary and then asking Duncan if they had to listen to such language. Jones testified that she did not recall that Duncan or Pulley ever asked Wood to restrain her vocabulary at any time during the meeting.

H. Insubordination in the TOR

In August 2002, Johnson was designated as charge nurse on her shift. Two operating rooms were being used for surgery and there was no clerk on duty. As charge nurse, Johnson answered the phones, retrieved blood from the blood bank, and did whatever was needed to keep the operating rooms functioning. Becky Wood and her nursing partner had been assigned to one of the operating rooms in use and Wood reported that they wanted their 4-hour relief. When Johnson and her nursing partner went into the operating room to relieve Wood and her partner, Johnson told Wood that because there was no clerk, Wood and her partner would have to answer the phone and be available at the desk if anyone came in to book a case or to handle anything else that might be needed. Wood responded that she was not going to answer the "[f—king]" phones and she didn't care if they rang off the "[f—king] hook." Dr. Tim Fagan, Respondent's TOR medical director, was present in the operating room during Wood's response to Johnson. Johnson continued her case until the end of her shift. The following day Pulley called Johnson at home and asked her about the incident with Wood. When Johnson returned to work, she was called into a meeting with Pulley, Duncan, and Wood. Johnson testified that during the meeting, Wood did not deny what she had said to Johnson. Pulley and Duncan asked Johnson if she considered Wood's remarks to be insubordination and Johnson said that she did. After leaving the meeting, Johnson spoke with Nurse Susan Capozzi-Vazquez who had been working with Johnson on the day of Wood's refusal to answer the phone. Capozzi-Vazquez mentioned to Johnson that just prior to Johnson's conversation with Wood, Wood also told Capozzi-Vazquez that she was not going to answer the phones when she received her 4-hour relief. Although Johnson attempted to speak further with Wood about the incident, Wood refused and responded rudely. In response to this additional information from Capozzi-Vazquez and Wood's response, Johnson wrote a note to Pulley on August 19, 2002, detailing Wood's additional rudeness. Johnson also explained that had she known about Wood's earlier attitude and comments to Capozzi-Vazquez, she would have written up Wood for the incident. In her note to Pulley, Johnson described Wood's conduct as unnecessary and unacceptable.

Becky Wood recalled the incident in which Johnson asked her to answer the phones. Wood admitted that she told Johnson "[f—k] that," adding that she had been in the operating room for 4 hours and she was going to get something to eat. Wood recalled that within the next week, she was called into the office to discuss the incident with Johnson, Pulley, and Duncan. She admitted to Duncan and Pulley that she had said "[f—k]" and that she had told Johnson that she had been in the room for 4 hours and that she was going to get something to eat. Wood confirmed that she neither received discipline for the incident nor was the incident included in her annual evaluation.

Denise Rowell testified concerning an incident in January 2003, when she had been charge nurse on a 12-hour shift and one of the nurses on duty was working her last night of orientation in the TOR. Rowell decided that this would be a good opportunity for the nurse to be paired with another nurse and to work autonomously while Rowell could function as backup as well as charge nurse. Johnson testified that anytime there are seven nurses present, it is always preferable to have the charge nurse free of assignment to cases. Rowell recalled that the nurse came to the main desk and indicated that since she had been up last for an operating room assignment, she was possibly going to bed. There are facilities for the nurses to rest or sleep during a 14-hour shift if they are not needed in surgery. Rowell explained to the nurse that not only was she not up last, but she was in fact up next for surgery. Rowell continued to explain to the nurse that her assignment had been changed for that shift and she would be working on a team with another nurse. The nurse became visibly angry and demanded to know what Rowell would be doing all night. Rowell explained that she would be working as charge nurse. Again the nurse demanded to know what Rowell would be doing and Rowell responded: "I'm going to be in charge." The nurse then replied: "So you're going to sit on your fat ass and [do] nothing while I work all night." Rowell asked the nurse twice if she were refusing the assignment and there was no reply. Kristina Johnson was present during the conversation and she also overheard the nurse's comment that Rowell was going to sit on her "fat ass" all night and the nurse's refusal to acknowledge whether she was refusing to take the assignment. Rowell testified that she telephoned Pulley at home and told her about the situation. Pulley told Rowell to leave the nurse assigned to work with the other nurse as planned. Pulley telephoned the unit and spoke with the nurse. After talking with Pulley, the nurse did not say anything further about the assignment. Sandra Weir not only corroborated the nurse's comments to Rowell, but also corroborated the nurse's having been called into the office to take Pulley's telephone call.

On May 10, 2002, Witzleb prepared an incident report involving a nurse's conduct on January 25, 2002. In the report, Witzleb described the nurse's comments in response to her assignment to an ophthalmology case involving an elderly patient with a self-inflicted shotgun wound and terminal cancer. Witzleb reported that the nurse made the comment in the TOR that "If those "[f—king] ophthalmology doctors want a "[f—king] microscope, they had better bring their asses down here and go to Chandler OR to get one because I'm not foolin' with no "[f—king] microscope." Witzleb testified that in April 2002 she had written another incident report involving this same nurse. Witzleb included in her April 28, 2002 report that the nurse came to the front desk and stated in a threatening tone

"Someone has been in my box again and took my schedules. This is the second time. I'm gonna have to come up in here and beat somebody's ass. I'll find out who's [doing] it and I'll set a trap for them—they'd better watch out. This is all over some petty crap that they should have already got over. They better not mess with me because they don't know who they are dealing with." Witzleb also included in the report that the nurse's comments had been made in the presence of others and that the nurse's threats and hostile manner made her extremely uncomfortable. While Witzleb submitted the incident report to Pulley the next day, she had no further discussion with Pulley about the incident until Witzleb brought it up after her own suspension.

Dr. Derange Boykin also testified concerning conduct by the same nurse who had been involved in the April and May 2002 incident reports. Because many of the TOR nurses work 24-hour shifts, they may only be in the TOR for 8 days a month. A nurse's communication book is maintained in the TOR for the nurses to share information with other staff members. Boykin testified that he had been present in the nurses' lounge on September 27, 2003, when the nurse entered the lounge. He recalled that she stated that someone had stolen her "[f—kin]" baby pictures from her locker. About an hour after her comment, the nurses' communication book included an entry with the following language:

> To the thief that stole the pictures of me and my baby off my locker, I would appreciate it if you would be woman enough to return them, and whatever problem you have with me, bring it to me. Leave my children *OUT* of *IT*.[7]

The nurse included her name in capital letters and added that the incident had occurred after she left work on September 26.

Cathy Craig testified that when she saw the note in the book she made a copy of it because she felt personally threatened and threatened for her coworkers. Approximately a week after the entry, the page was torn from the communication book. On October 12, 2003, Craig prepared a letter concerning the nurse's September 27 entry. The letter that is signed by Craig and eight other TOR nurses states that those signing the letter are "alarmed at what is an openly hostile letter directed at us or our coworkers." The letter further addresses their concern with their safety and the safety of their patients "due to the confrontational tone set in the communication." Craig left a copy of the letter for Duncan, Rhonda Nelson, and Gloria Thomas in their respective offices. Craig never received any response from anyone in management concerning her letter.

Susan Capozzi-Vazquez recalled that after seeing the nurse's communication book entry, she told Pulley that the entry was very disturbing to her. Pulley told her that Raburn and Duncan had been made aware of the entry and if she had any problems with it, she could address it to them. In response to Pulley's comment, Capozzi-Vazquez wrote a letter to Raburn on October 9. In her letter, Capozzi-Vazquez not only explained that she perceived the nurse's entry as an "Attack," but that she was also concerned for her own safety and that of her coworkers. Capozzi-Vazquez gave a copy of the letter to not only Raburn, but also to Duncan, Nelson, and Thomas. Although Capozzi-Vazquez was given an opportunity to discuss her concerns with Nelson, no other manager spoke with her about her October 9, 2003 letter.

I. Respondent's Evidence Concerning Alleged Insubordination by Other Nurses

Pulley acknowledged that Johnson reported Wood's response when directed to answer the telephone as "I'm not answering the fucking phones, I'm going to bed." Pulley was also aware that this statement had been made in the presence of Fabian and others. Pulley not only asked Johnson to write up the incident, but she also held a meeting with Wood and Johnson. Pulley testified that during the meeting Wood denied saying that she was not going to answer the "[f—king] phone. Pulley also admitted that she later received Johnson's second statement concerning the incident with Wood.

Pulley further testified that Rowell reported to her the incident involving the nurse's statement to Rowell about sitting on her "fat ass." Pulley testified that she telephoned the nurse and told her that her comments to Rowell had been "wrong." Pulley asked the nurse if she could "go back out, work with Denise, apologize to her, and straighten things out" without Pulley's having to intervene. The nurse stated that she could do so. In response to questions by counsel for the General Counsel, Pulley testified that the nurse "questioned" Rowell's assignment but did not refuse it. On further cross-examination, Pulley was asked if the nurse's statement was insubordinate conduct toward a nurse in charge. Pulley acknowledged that such conduct was "inappropriate" but not insubordinate because the nurse had not refused the assignment. Raburn testified that the nurse's statement to Rowell was inappropriate and "might be" insubordination. Raburn was unaware of whether any discipline resulted from the incident. The nurse's performance evaluation for 2003 includes a brief reference to the incident involving Rowell. The evaluation includes: "There was one isolated incident with another employee where an inappropriate comment was made to this employee. Sharon was talked with and this kind of problem has never happened again. Sharon exhibits positive interaction with fellow employees. A team player and deserves a three in this category." A category of three indicates that the employee meets or slightly exceeds performance expectations in a particular category.

Pulley testified that she first learned of the September 2003 entry in the communication book from the nurse who made the entry. Pulley recalled that the nurse paged her and told her that she had made the entry in the book. The nurse told her that she wanted her to know because Pulley would probably hear about it on her next shift back to work. Pulley testified that she told the nurse that she should not have displayed her anger in that way however, she could certainly understand how the nurse would want to make the entry in the communication book. Pulley also recalled that she and Raburn later spoke with the nurse about her inappropriate comments.

Susan Raburn testified that she received Witzleb's May 10, 2002 report concerning this same nurse's statements in the TOR. Raburn testified that she gave the report to Duncan and she had no knowledge as to whether the nurse was counseled or disciplined for the incident. Raburn also acknowledged Witzleb's April 2002 incident report in which Witzleb reported the nurse's

[7] The original note contained double underlining.

having used "inappropriate language" or having been "argumentative with someone at the hospital." Raburn recalled that management counseled with the nurse about her conduct. Raburn acknowledged that the nurse admitted that she had threatened to "kick someone's ass" and Raburn confirmed that such conduct was a violation of Respondent's Medcare standards. Raburn recalled telling the nurse:

> We said we understand how frustrating it is to have your schedule taken out of your mailbox for three months, and we understand that you feel like this is targeting you, and it was directed at you, but this is not the appropriate way to handle this.

Raburn testified that she also told the nurse that management would take further action if they heard of her doing anything of this kind again.

Raburn acknowledged that she was unaware of any discipline in the nurse's personnel file. Raburn also admitted that the nurse's December 2002 annual evaluation contained no reference to the January 25 or the April 28, 2002 incidents. Additionally, the evaluation contained no reference to the nurse's making threats, inappropriate comments, or insubordination. Raburn admitted that she received two separate reports from nurses stating that they felt threatened because of the nurse's September 27, 2003 entry in the nurses' communication book. Raburn testified that she turned the matter over to Duncan and she had no knowledge of any counseling or discipline to the nurse for this incident. Raburn admitted that the nurse's December 2003 performance appraisal contained no reference to misuse or inappropriate comments in the communication book. The only supervisor's comments in the appraisal included a commendation for the employee's "handling strife in the unit with professionalism" as well as the following:

> Things directed at her have not prevented her from remaining professional with her co-workers. She has reported differences to management for their intervention. She is very supportive of management decisions in the unit.

J. Becky Wood's Contact with the NLRB

Wood testified that in early 2003 she received a message on her answering machine from someone with the NLRB. She did not recall the name of the individual who left the message. Wood did not return the call immediately. Within a few weeks of getting the message, she happened to see Pulley in the lounge at work. She stopped Pulley and asked her if she knew why the "Labor Board" was trying to contact her. Wood testified that Pulley told her that she didn't need to talk with the Labor Board; she needed to go to administration and speak with the corporate legal department. When Wood asked Pulley what she thought the call concerned, Pulley suggested that it probably concerned Jeanette Blackshear who had been terminated the previous year. Wood later gave a telephone affidavit to the Board concerning Blackshear in May 2003.

Later in 2003, Wood went into the NLRB's Regional Office and provided an in-person affidavit. It was in that affidavit that she mentioned her earlier conversation with Pulley about the telephone message from the NLRB. On May 8, 2003, NLRB Field Attorney Linda Mohns sent a letter to Respondent's counsel supplementing an earlier letter and listing additional allegations for which a response was requested in Case 26–CA–21173. The May 8 letter included the allegation that in February 2003, Pulley instructed an employee that she was not "under any circumstances, to talk to the NLRB investigator who had contacted her." By letter dated May 28, 2003, Respondent's counsel responded to the Region's request for information. In the nine-page letter addressing 16 separate allegations, Respondent's counsel confirms that Wood sought out Pulley to inform her of the telephone call from the Board and to ask what she should do in response. Respondent informed the Region that Pulley suggested that Wood contact human resources or Respondent's attorneys if she was unsure of what to do. Respondent categorically denied that anyone instructed Wood not to talk to the NLRB.

K. Wood's Extended Sick Leave

Wood testified that she had a doctor's appointment on either May 29 or May 30, 2003. For a reason that she could not recall, the doctor was unable to see her as scheduled. The doctor cautioned her not to return to work until he was able to examine her and a second appointment was scheduled for either June 2 or 3. Wood testified that she telephoned Pulley on the same day that the doctor rescheduled her. Wood explained to Pulley that the doctor did not want her to return to work until her next scheduled appointment that was set for the following week. Wood recalled that while she telephoned Pulley at the end of the week, she was not scheduled to work again until the beginning of the following week. Wood told Pulley that she would call her again as soon as she was able to see the doctor. Pulley told her to contact human resources and to find out what paperwork was needed for extended sick leave. Wood submitted a request for extended leave dated June 4, 2003. The six-page document included the signature and certification of her treating physician. Wood later received a letter from human resources confirming that the sick leave was approved. Wood did not return to work until later in August.

Wood testified that as long as an employee gives 24-hour notice, they could be paid for the entire period of extended sick leave. When Wood received her first check around the middle of June, her pay was short for 24 hours. Thinking that this shortage was a mistake, Wood telephoned Pulley and then Duncan. Duncan explained that it was management's discretion as to whether she would be paid for the first 24 hours of her absence. If the absence is deemed to be a hardship on the unit, Respondent has the option to deny pay for the first 24-hour period. The parties stipulated that Wood was not paid for the first 24 hours of her absence that began on June 1, 2003.

Respondent's personnel manual sets forth the procedure for an employee taking extended sick leave. The policy provides that extended sick leave will be paid beginning with the fourth consecutive scheduled workday missed due to illness or injury. The policy further provides that the first 3 days must be paid from the paid time off (PTO) account. Wood admitted that under Respondent's PTO policy, PTO may be denied where it would cause undue hardship. Wood also admitted that Ashburn, Witzleb, Kimmons, and Sandy Long are active union supporters who have

been paid for the first 24 hours of sick leave. Wood also acknowledged that while she had worn a union ink pen around her neck she had neither attended union meetings nor distributed union handbills. Her picture was not displayed in any of the union handbills.

Kristina Johnson requested extended sick leave from the second week in May 2003 until the second week in June 2003. Although Johnson notified Pulley of her need for extended sick leave at least 2 days before her next scheduled shift to work, she was denied pay for the first 48 hours of her absence. When she asked Pulley why she was not paid, Pulley told her that the unit was short staffed and it was within Respondent's discretion to deny pay. When Johnson later made the same inquiry of Randy Britton, Respondent's director of employee relations, she was again told that the unit was short staffed and Respondent was not required to pay her.

Ashburn recalled that she telephoned Raburn on May 16, 2003, and told her that she was going to have to take extended sick leave. Ashburn was next scheduled to work on May 18. Ashburn later submitted the necessary paperwork and her extended sick leave was approved. Ashburn's first 24 hours of her absence was paid from her PTO bank and the remainder from her extended sick bank.

III. ANALYSIS AND CONCLUSION

A. Jurisdiction

1. Applicable law

While Section 2(2) of the Act defines an "employer" to include any person acting as an agent of an employer, directly or indirectly, the Act specifically excludes any State or political subdivision thereof. Respondent asserts that it is not subject to the Board's jurisdiction because it constitutes a political subdivision. General Counsel argues that the Board may properly exercise jurisdiction over Respondent because, other than initially appointing its board of directors, the relevant public officials do not exercise sufficient control over Respondent's board to make it responsible to these public officials.

In *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), the Supreme Court found that State law is not controlling on the question of whether an entity is a political subdivision and that it is to the "actual operations and characteristics" of the entity that the Board must look in deciding whether the entity is exempt from the Act's coverage. Id. at 603–604. The Court adopted the Board's test, which limits the exemption to entities that are either (1) created directly by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate. Id. at. 605.

In determining whether the Board will assert jurisdiction or exempt an employer as a political subdivision, the Board has considered a number of factors over the past years. In *Res-Care, Inc.*, 280 NLRB 670 (1986), the Board held that in determining whether to assert jurisdiction over an employer with close ties to exempt Governmental entities, it would determine the extent of the control exerted by the exempt entity over essential terms and conditions of employment retained by the employer and the exempt entity in order to determine whether the employer was capable of engaging in meaningful collective bargaining. In a later case however, the Board rejected the earlier test articulated in *Res-Care, Inc.*, finding it "unworkable and unrealistic." In its decision in *Management Training Corp.*, 317 NLRB 1355, 1358 (1995), the Board decided that in determining whether to assert jurisdiction, it would only consider whether the employer meets the definition of "employer" under Section (2) of the Act and whether the employer meets the applicable monetary jurisdictional standards. The Board further explained that jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employees' terms and conditions of employment.

In its l989 decision in *University of Vermont*, 297 NLRB 291 (1989), the Board found the employer exempt from the Board's jurisdiction as a political subdivision. Applying the test in *Hawkins County*, the Board took note of the fact that the University was created by a special act of the Vermont General Assembly. The legislation was later amended however, to allow the University's board of trustees full power to use, control, sell, or dispose of all the real estate and personal property belonging to the University. The board of trustees operated in an autonomous fashion with independent authority to establish personnel policies, wages, benefits, and to enter into collective-bargaining agreements and to ratify such agreements without the approval of the legislature. In its rationale for finding the University exempt from jurisdiction, the Board specifically noted that because 12 of the 21 trustees were selected by the State, either by legislation or by gubernatorial appointment, the State clearly exercised control over the university's board of trustees. Id. at 295.

In contrast to the facts involved in the *University of Vermont* case, there is no dispute that Respondent was not created by the State of Tennessee. Accordingly, Respondent is exempt under *Hawkins County* only if officials who are responsible to public officials or to the general electorate administer it. Respondent argues that it meets this second criterion and is thus exempt from the Board's jurisdiction.

In its 2002 decision in *Research Foundation of the City of New York*,[8] the Board did not find the employer exempt from jurisdiction. Similar to the facts of this case, the employer was not subject to Governmental competitive civil service requirements including competitive bidding and purchasing practices. Unlike Respondent however, the employer received its revenues from private fees and received no direct tax-levy funds or funds from any Government appropriating authority. While there was voluntary submission of financial information to the Government, the employer's budget was not approved by any Government agency. The appointment and removal of the employer's board of directors was grounded solely in the bylaws with removal of board members determined by the board itself. The Board found that the 17-member board was not responsible to any public official or the general electorate. Following *Hawkins County*, the Board reiterated that in order to determine whether an entity is "administered" by individuals responsible to public officials or to the general electorate, the Board considers whether the individuals are appointed by, and subject to, removal by public officials. Id. See also *Hawkins County*, 402 U.S. at 605.

[8] 337 NLRB 965 (2002).

This requirement is consistently evidenced throughout Board decisions. In *Cape Girardeau Care Center, Inc.*, 278 NLRB 1018, 1020 (1986), the Board did not exempt the employer from its jurisdiction. The employer's incorporation as a not-for-profit corporation occurred a month prior to the county's resolution approving its formation and it was found that the employer was created in order to issue tax-exempt bonds to purchase a nursing home facility. Of significance was the fact that the county neither had the authority to appoint the board of directors nor to remove any board member. The incumbent board members actually selected their successors subject to county approval. The Board determined that there was no "direct personal accountability" by the board to the county's public officials and any approval was simply ministerial. In *St. Paul Ramsey Medical Center,* 291 NLRB 755 (1988), the employer had at one time been an exempt political subdivision as it had been managed and operated by a commission specifically created by an act of the state legislature. The prior act was repealed and replaced with an act that created the employer as a nonprofit "public corporation." In its revised organization, the employer underwent significant changes in its management and operation. While the Board found that the employer was no longer an administrative arm of the Government, it went on to consider whether the employer met the second prong of the *Hawkins County* test. In finding that the employer also failed this second test of *Hawkins County,* the Board noted that there was no requirement that the employer's board of directors be Government officials or "appointed" by Government officials. Additionally, there was no provision for the removal of its board members by any Government official. Accordingly, the employer was not an exempt political subdivision as it was neither an administrative arm of the Government nor did individuals who were responsible to public officials administer it.

In following *Hawkins County*, the Board has continued to consider the relationship between the employer's governing body and the Governmental agency to which it is linked. The Board has continued to find it significant if a majority of an employer's board of directors is composed of individuals responsible to public officials or individuals responsible to the general electorate. See *FiveCAP, Inc.*, 331 NLRB 1165 (2000). For an entity to be deemed "administered" by individuals responsible to public officials or to the electorate, those individuals must constitute a majority of the board. See *Enrichment Services*, 325 NLRB 818, 819 (1998). In his brief, counsel for Respondent argues that the *Hawkins County* test does not require that the public officials involve themselves in day-to-day administration or decisions affecting the employer. Citing *Camden-Clark Memorial Hospital*, 221 NLRB 945, 948 (1975), Respondent urges that the requirement that public officials appoint a majority of the governing board establishes the requisite accountability.

2. Other factors for consideration

There are a number of factors demonstrating that Respondent's employees do not share common working conditions with city or county employees. Respondent's employees who have been hired after 1981 are neither eligible for the county's retirement program nor are they a part of the county's other insurance and benefits programs. There is nothing in the record to indicate that Government officials are involved in the day-to-day operation of the hospital. Respondent maintains its own general liability and medical malpractice insurance policies separate from the county.

In her brief, counsel for General Counsel argues that there are a number of factors to demonstrate that when Respondent was created, it was not intended to be an agency of the county Government. Specifically, General Counsel references the minutes from a 1981 board of directors meeting in which the chairman of the county board of commissioners stated that Respondent was not an agency of the county Government. The minutes also include the statement that a principal reason for dissolving the Memphis and Shelby County Hospital authority and leasing the hospital to Respondent was to remove the county Government from the operation of the hospital except to the "limited extent" set forth in the lease agreement. Additionally, General Counsel argues that there are continuing instances when Respondent has not held itself out as a Government agency. General Counsel submitted into evidence litigation documents from three prior lawsuits involving Respondent. In one lawsuit, a discharged employee sued Respondent seeking a civil service remedy. Respondent defended the suit by taking the position that the employee ceased to be a civil service employee when Respondent took over the hospital operations in 1981. The second lawsuit involved Respondent's initiation of a Section 301 suit in a 1990 Federal district court proceeding, seeking to vacate an arbitration award. In its complaint, Respondent states that it is a private hospital and is an "employer" within the meaning of the National Labor Relations Board Act. The third case concerned a 1989 State court proceeding commenced by a local newspaper. The newspaper filed a petition in Shelby County Chancery Court for the disclosure of certain records of Respondent under the Tennessee Public Records Act. Respondent opposed the disclosure and argued that it was not a Governmental entity or department under the county Government. The litigation materials reference a 1989 affidavit by Respondent's president in which the president asserts that Respondent is not dependent upon the county and does not depend upon the mayor or the county commission to manage or operate the hospital. In May 2003, nurse Leann Beasley wrote to the mayor requesting his assistance with the union organizing drive. The mayor declined to do so. General Counsel also argues that it is significant that the mayor responded that it would be inappropriate for him to take an active role in the unionization issue. He went on to add that The Med is a separate corporation and if he were to get involved in its management activities, lawyers suing the hospital for negligence or for other causes would be able to contend that the corporation is simply the Shelby County Government.

3. Summary and conclusion

While there are a number of factors that would otherwise have been significant under the Board's previous test in *Res-Care*, the applicable standard for determining Respondent's exempt status continues to be the test set out *Hawkins County*. General Counsel's evidence clearly demonstrates that Respondent has taken a contrary legal position in prior litigation. While Respondent's contradiction in successive legal arguments may indicate that Respondent's current argument is disingenuous, I don't find the contradiction to be a significant factor. The fact that Respondent's attorneys have initiated and defended prior lawsuits by

using contrary legal arguments does not diminish the specific facts that must be considered for the *Hawkins County* analysis. While it is undisputed that there is no specific state statute establishing Respondent's existence, individuals who are responsible to public officials administer Respondent. General Counsel acknowledges that Respondent's board of directors are appointed by the county mayor with the approval of the county commission and likewise they are subject to removal by the mayor and the commission. While there is no evidence that the mayor or commission have removed a board member while serving their term, the mayor has denied reappointment to board members.

In *Rosenberg Library Assn.*, 269 NLRB 1173 (1984), the Board found an employer to be exempt despite the fact that the employer's employees did not share the same wages and benefits with city or county employees. Under the provisions of a benefactor's will, a 20-member board of trustees was established to select the board of directors. Seventy-five percent of the employer's operating budget was derived from county and city taxes. The employer's board of directors was required to submit its budget first to the county judge and then to the county commissioners. After a series of hearings, the commissioners determined the amount of funding that would be allocated to the library association. In finding that the employer was exempt as a political subdivision, the Board determined that the employer was administered by individuals who were responsible to public officials including the county judge and the county commissioners who controlled budgetary and operational policies.

In a more recent case, the Board also found the employer to be exempt under similar circumstances. In *Oklahoma Zoological Trust*, 325 NLRB 171 (1997), the employer's operations were funded almost exclusively from public funds. The employer's meetings were required to be public and the employer's budget was placed in the public domain. The employer was required to annually file its budget with the mayor and city council. More significantly, the mayor appointed the trustees. In his dissenting opinion, Chairman Gould placed much significance on the fact that both the composition of the board of trustees and the appointment procedure were established by a trust agreement, not by statute. In his opinion, the trustees were therefore accountable by choice and not by law. Id. at 173. The Board majority, however, did not find this to be a limiting factor and found the employer exempt from jurisdiction. In the present case, I note that it is the lease agreement and not a State statute that provides the authority for the appointment of the board of directors. Under the terms of the lease however, Respondent cannot unilaterally change the method of selection of its board of directors.

Based on the total record evidence, I find that Respondent is administered by board members who are responsible to the mayor and the county commissioners of Shelby County, Tennessee. While there is no evidence that any board member has been removed during his or her term, the mayor and the county commission appoint each board member and have previously exercised their authority to deny reappointment of board members. Shelby County owns all of the land and improvements that comprise the hospital facility. The county commissioners dissolved the previous Memphis Hospital authority contingent upon Respondent's formation and the establishment of the contractual lease agreement between Respondent and the county. The lease agreement includes the following restrictions and limitations: (1) Respondent's annual budget is subject to the approval of the county; (2) Respondent is required to have a public audit and to file an annual financial report to the county; (3) Respondent is required to make the facility available to all Shelby County residents who are in need regardless of their financial status; (4) the meetings of Respondent's board of directors are subject to the Tennessee open meetings act, and, (5) the number and the selection of Respondent's board of directors remains subject to appointment by the mayor and county commission as set out in Respondent's initial charter. The county may terminate the lease if there is any change in the number or method of selection of the board of directors.

Respondent's operating budget is not only approved by the county commission but is funded by county fees and property taxes. While Respondent operates its facility independently on a day-to-day basis, the county commissioners and the mayor have previously become involved in labor matters and operational issues. In 1994, after an appeal from AFSCME's attorney and representative, the commission issued a resolution urging Respondent to proceed expeditiously to an election. When contract negotiations broke down in 1995, the county directed Respondent to mediate the dispute with AFSCME and to "get a contract." Whitaker testified that the county gave Respondent no option or discretion as to whether it would enter into a contract or memorandum of understanding with the Union.

Accordingly, the total record evidence supports a finding that Respondent is exempt from the Board's jurisdiction as a political subdivision and I recommend dismissal of the complaint. In the event that the Board does not find a sufficient basis to affirm my recommendation, I have also included findings with respect to all complaint allegations.

B. Whether Respondent Unlawfully Terminated Amelia Witzleb

General Counsel asserts that Respondent terminated Witzleb because of her activities in support of the Union. In cases alleging 8(a)(3) violations that turn on an employer's motivation, the Board applies an analysis in which General Counsel bears the burden of establishing a prima facie showing that (1) Witzleb engaged in union activity; (2) Respondent had knowledge of that activity; and (3) Respondent based its discriminatory action on antiunion animus. *Wright Line*, 251 NLRB 1083 (1980). Once the General Counsel has met this burden of persuasion, the burden shifts to Respondent to demonstrate by a preponderance of the evidence, that it would have taken the same action absent Witzleb's protected activities. *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

With respect to the employer's burden under *Wright Line*, the Board has said that it is not enough to show that it had a legitimate reason for imposing discipline against an employee; the employer must demonstrate that the same action would have been taken even without the protected conduct. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989).

The evidence in this record clearly establishes that Witzleb engaged in protected activity prior to her discharge. It is undisputed that Witzleb was one of the most visible and active union supporters. If there had been any question about her support,

Witzleb's face and her own words prominently displayed on the Union's August 2002 handbill extinguished any possible doubt. Even after appearing in the Union's handbill, Witzleb continued to engage in conduct that brought her to the attention of hospital management. Witzleb followed Steinhauer's August 24 employee meeting with a personal letter to him. In the letter, Witzleb acknowledged that because of her comments during Steinhauer's August 24 meeting, she might have been labeled as "rude" or a troublemaker. While Witzleb apologized for any rudeness, she went on to state that she would not apologize for being a troublemaker if being a troublemaker involved refusing to stand by and watch an injustice, refusing to back down when one's principles of truth and human decency are challenged, and refusing to stop complaining until wrong situations are rectified in the workplace. She proudly proclaimed that if a "troublemaker is someone who is passionate when it comes to fighting social inequities, then here I stand." Undeniably, Witzleb could not have made any clearer her intentions to continue her support for the Union and to continue her opposition to Respondent's resistance to unionization. Thus, General Counsel has clearly established the first two prongs of the prima facie case.

In order to meet the *Wright Line* test, General Counsel must also prove that animus was a substantial or motivating factor during the employer's decisionmaking process. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). In essence, General Counsel must prove that animus was present during the decisionmaking process. *Sears, Roebuck & Co.*, 337 NLRB 443, 443 (2002). Neither the complaint alleges nor the record contains evidence that any member of management threatened Witzleb or any other employee because of their union activity.[9]

While there is no direct evidence that Respondent terminated Witzleb because of her activities in support of the Union, Board precedent allows a finding of animus to rest on indirect evidence in appropriate cases. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). It is recognized that since direct evidence of motivation is seldom available, the motivation required to establish unlawful discrimination may be shown by less than direct evidence. *Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998); *NLRB v. Buckhorn Hazard Coal Corp.*, 472 F.2d 53, 55 (6th Cir. 1973); *Shattuck Denn Mining Corp. v. NLRB*, 361 F.2d 466, 470 (9th Cir. 1966).

In late summer or early fall of 2002, the Union distributed a handbill containing Witzleb's photograph as well as four other nurses. Each photograph was accompanied by the nurse's multiparagraph statement concerning why the nurses needed union representation. In a separate handbill in August 2002, Witzleb's signature appeared along with other nurses' signatures demonstrating their support of the Union. Becky Wood testified that when Croce read the handbill containing the signatures, he responded, "These names will be forever emblazoned in my mind." In Croce's August 22, 2002 memorandum to the TOR nursing staff, Croce explained that he was adamantly opposed to the nurses' union representation and he referenced the Union's attempt to "infiltrate" the hospital. While he did not specifically threaten nurses for their support of the Union, he included the statement: "For those who are not interested in working hard or truly making a difference in patients' lives—the MED may not be the place for you." In a November 26, 2002 memorandum to all registered nurses, Nelson and Crawford informed the nurses that Respondent would not recognize the union representation of registered nurses through informal or any other means. It is undisputed that during the period of the Union's organizing, a petition for nurses to show that they did not support the Union was posted on Pulley's door. Witzleb credibly testified that the petition remained on the door for several weeks or months.

Croce wrote his August 22 memorandum to the TOR nursing staff on Respondent's letterhead and he signed the memorandum as professor of surgery, medical director of the trauma intensive care unit, and chief of trauma and intensive care. Respondent, however, denies that Croce is either a supervisor or an agent of Respondent. Respondent argues that all of the physicians who provide services at The MED are independent contractors and thus not agents of Respondent.

Nurse Leann Beasley testified that she received Croce's letter from her nurse manager, Barbara Smith, who commented to Beasley, "these are my sentiments exactly" as she gave Beasley the letter. The minutes of TOR staff meetings reflect that nursing managers convey to the staff nurses the practices and procedure that Croce requires the nurses to follow. In determining whether a person is acting as the agent of another, the Board applies the common law principles of agency. See *Allegany Aggregates*, 311 NLRB 1165 (1993). Under the doctrine of apparent authority, an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988). In determining whether the actions by individuals towards employees are attributable to the employer, the test is whether "under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426 (1987). I find that under all the circumstances, the nurses would reasonably believe that both Croce's verbal and written statements about the Union reflected Respondent's views and that in making those statements he was acting on behalf of management.

The record is undisputed that through Respondent's November memorandum to employees and its visible support for the "anti-union petition" Respondent actively opposed the Union's organizational efforts. It is well established that any employer has a perfect right to oppose a union and the employer is free to communicate to its employees its general view about unionism or any

[9] General Counsel witness Sandra Weir testified concerning a statement made by neurosurgeon Michael Mulbauer in December 2003. The record reflects that Mulbauer is a physician with Semmes Murphy Clinic; a physician's group (with the agreement of the University of Tennessee Medical Group) that contracts to provide neurology professional services to Respondent's patients. While Respondent stipulated that Mulbauer is in practice with one of Respondent's board members, the record contains no evidence to establish that Mulbauer was acting as Respondent's agent. During the course of the conversation Mulbauer told Weir about union organizers passing out handbills at the Semmes-Murphy Clinic and he included: "You girls are going to get yourselves in a lot of trouble." I find no basis to establish that Mulbauer was acting as an agent of Respondent.

specific views about a particular union as long as the communication does not contain any "threat of reprisal or force or promise of benefit." See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). While General Counsel alleges that Respondent's memorandum is violative of the Act, I have not found the record to support this allegation and my findings concerning this allegation are discussed in a separate portion of this decision. Conduct that is not independently found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful. *Meritor Automotive, Inc.*, 328 NLRB 813 (1999); *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993). Even lawful statements of opposition to unionization can serve as a "backdrop and setting" for evaluating an employer's motivation. *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972). The Board has held that an employer's expression of antiunion comments, while not themselves violative of the Act, may nevertheless be considered as background evidence of animus toward employees' union activities. *Tim Foley Plumbing Services*, 337 NLRB 328, 329 (2001); *Gencorp*, 294 NLRB 717 fn. 1 (1989).

While the record is devoid of direct evidence of animus, I nevertheless find that based upon the totality of the circumstances, General Counsel has satisfied the burden of demonstrating unlawful motivation. Among the factors that the Board has found to support an inference of animus are (1) suspiciousness of timing; (2) abruptness of the termination; (3) failure to adequately investigate the alleged misconduct; (4) departure from past practice; (5) disparate treatment of discharged employees; (6) shifting or inconsistent reasons; and (7) false or pretextual reasons given to explain Respondent's action. See *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

There is neither suspicious timing nor an abrupt discharge to support the inference of animus. At the time of Witzleb's discharge, she had actively supported the Union for at least 6 months. Because she was absent from the hospital for sick leave, her termination occurred approximately 6 weeks after the incident for which she was allegedly discharged. The more significant factor that supports an inference of animus, however, is Respondent's departure from past practice.

Witzleb's termination notice states that Witzleb was terminated for a violation of "MedCare Standards and Standards of Conduct as it relates to personal demeanor and insubordination, including use of discourteous, profane, or loud language; disrespectful conduct or language toward or relating to a person acting in a supervisory capacity (Charge Nurse); Argumentative behavior in communicating with a person in a position of authority; Conduct or language that is derogatory or may undermine authority; or other conduct which signifies intentional disregard for, or unwillingness to submit to the authority of the hospital." Fundamentally, Respondent alleges that Witzleb was terminated because of her language and her "insubordination" or argumentative behavior toward a person in authority. Virtually each witness for the General Counsel testified that profanity in the TOR was commonplace and used by both nurses and physicians. Even Hester Moore admitted that profanity did not offend her and that she also uses profanity in the operating room. Anesthesiologist Boykin credibly testified that over the last 2 years he has heard Moore use profanity at least twice weekly.

Additionally, General Counsel also presented evidence of nurses' insubordinate behavior that was not disciplined. Both Wood and Johnson credibly testified that when Johnson assigned Wood to answer the phones at the front desk, Wood not only used profanity but also refused to do so. Both Johnson and Wood credibly testified that Wood did not deny her behavior when confronted by Johnson, Pulley, and Duncan. Wood, however, received no discipline for her behavior. Rowell and Johnson credibly testified that during a nurse's last night of orientation in the TOR the nurse accused Rowell of sitting on her "fat ass" all night when Rowell gave the nurse a new assignment. Pulley admitted that Rowell telephoned her to report the nurse's behavior. Admittedly, Pulley called the nurse and asked if she could "go back out, work with Denise, apologize to her, and straighten things out" without Pulley having to intervene further. No discipline was given to the nurse and her annual performance appraisal referenced only an "isolated incident" involving an "inappropriate" comment. Despite the reference to the incident, she was evaluated as meeting or slightly exceeding performance expectations.

It is undisputed that another nurse repeatedly engaged in conduct that was described by her peers as threatening and unprofessional. Respondent does not deny knowledge of the nurse's profanity and refusal to assist with getting necessary equipment for an ophthalmology procedure in January 2002 or that she threatened other employees in April 2002. In September 2003, the same nurse wrote an inappropriate and angry note to other nurses in the nurses' communication book. Admittedly, management received letters from nurses expressing concern for their own safety and the safety of others concerning the communication book entry. Although Raburn admitted that the nurse's conduct was in violation of MedCare standards, the nurse received no discipline for any of these incidents. Neither her 2002 nor 2003 performance appraisals contained any reference to her profanity, threats, or inappropriate conduct. On the contrary, her behavior with coworkers was described as professional and she was praised for being "very supportive of management decisions in the unit."

Pulley attempted to distinguish the behavior of these nurses by asserting that while their behaviors were inappropriate, they did not actually refuse assignments. Pulley described the nurse's comment to Rowell as "questioning" rather than insubordinate. While both Raburn and Pulley testified that they spoke with the nurse who was the subject of Witzleb's incident reports of April and May 2002, about making inappropriate comments, it is undisputed that the nurse received no discipline. I credit the testimony of Johnson, Wood, and Rowell in finding that nurses have not only used profanity toward charge nurses but have also refused work assigned to them by charge nurses. Pulley's attempt to make a fine distinction of "questioning" rather than "refusing" simply belies Respondent's denial that similar conduct was tolerated from other employees. The overall record reflects that other nurses have used far more offensive profanity in the TOR without discipline or even dissuasion. Additionally, Respondent has tolerated similar or even more insubordinate conduct than that demonstrated by Witzleb. There is no evidence that any of these other employees who engaged in similar conduct were active or vocal union supporters. On the contrary, one of the nurses was

specifically recognized as an employee who reported fellow employees and supported management. Wood testified without contradiction that when Croce read the names of the nurses supporting the Union, he remarked: "These names will be forever emblazoned in my mind." Thus, even though there is no direct evidence of animus, animus may be inferred from all of the circumstances. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991). Additionally, the Board has found that blatant disparity is sufficient in itself to support a prima facie case of discrimination. See *New Otari Hotel & Garden*, 325 NLRB 928 fn. 2 (1998). The Respondent's tolerance for similar conduct from other employees in addition to Respondent's demonstrated opposition to the Union supports an inference that Witzleb's union support was a motivating factor in Respondent's decision to terminate her. Accordingly, based upon the record as a whole, I find that General Counsel has established that union animus was a motivating factor in her discharge. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002).

Once General Counsel establishes a prima facie case that an employee is terminated because of his or her protected activity, the burden shifts to the respondent to establish that the same action would have taken place in the absence of the employees' union activities. An employer cannot carry its *Wright Line* burden simply by showing that it had legitimate reasons for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985).

In support of its position, Respondent submitted records to demonstrate that it has disciplined other employees for similar conduct. Respondent contends that Respondent's Exhibits 33 and 34 contain 223 instances of discipline for acts of insubordination and improper conduct between January 1, 2000, and December 19, 2003. Undeniably, Respondent's records indicate that it has previously disciplined other employees for reasons arguably related to the use of profanity and insubordination. Contrary to Respondent's assertion, however, not all of the submitted discipline documents relate to conduct similar to that for which Witzleb was allegedly terminated. Respondent's Exhibit 33 also contains records documenting (1) an employee's November 2000 termination for loitering in an unauthorized area; (2) an employee's first reprimand for cooking sausages on the heating unit of the coffee maker in the nursing staff office of the patient clinical area; and (3) an employee's suspension for failing to secure a confidential document and allowing it to be distributed within the complex. On first blush, it would appear that Respondent's records document instances when it has similarly disciplined other employees for conduct comparable to that involved in the instant case. Upon closer examination however, Respondent's records also demonstrate Respondent's past practice of tolerance in similar circumstances as well as a practice of administering lesser discipline for similar or more egregious kinds of conduct.

Respondent's records[10] reflect that an employee was terminated in April 2003 for insubordination. The records also reflect however, that prior to her discharge, the employee received a first and second reprimand on September 18, 2002, and December 20, 2000, for leaving the hospital without permission. On February 12, 2003, the employee received a 3-day suspension for several infractions including insubordination and the use of profanity. On April 2, 2003, the employee took a smoke break rather than assist the patient to whom she had been assigned. The employee was found by the manager and escorted to the patient's room. While in the patient's room, the employee in the presence of the manager, argued with the patient resulting in her removal from the room. The employee was placed on probation from April 3 to May 3, 2003. The employee was finally terminated on April 30 for non-compliance with the terms of the probation.

Respondent's records[11] also show that an employee was terminated in 2001 for two incidents occurring in December 2000, for disruptive, disrespectful, and unacceptable behavior under Respondent's standards of conduct related to proper personal demeanor and insubordination. The personnel action review committee decision prepared by Respondent's director of employee relations, Randall Britton, stated that in less than a year from the employee's hire date, the employee "had been in trouble at least four times for Respondent's records also show that an employee was suspended and lost only 2 days, pay after an altercation in which she repeatedly pushed a file cart into another employee. The injured employee was diagnosed with a contusion and back strain, placed on light duty for 2 weeks, and sent for several sessions of physical therapy due to her injury.

Respondent's records show that an employee[12] was terminated for insubordination on June 3, 2003. The records also reflect however, reflect that prior to the insubordinate conduct resulting in her termination, there had been "numerous incidences" where the employee was "insubordinate by repeatedly not giving adequate notice when she would be late, failing to timely respond to pages, and refusing assignments." Prior to this employee's discharge, she was given the benefit of the progressive disciplinary system, receiving a final warning and then a 3-day suspension.

Respondent's records[13] also reflect that an employee was discharged in 2002 for violence and threats of violence and smoking in an unauthorized area. During the year prior to his discharge, the employee was verbally counseled for suggesting to his coworkers that they "gang rape" another employee. In a second incident, the employee was suspended for 3 days for failing to complete an assignment and then becoming hostile and belligerent with his supervisor. The employee was later discharged after swinging hedge clippers at another employee and repeatedly telling the employee: "I'll kill you, you m_____ f_____." Interestingly, the employee who was threatened with the hedge clippers was the same employee that had been earlier threatened with gang rape.

Thus, while Respondent's records reflect that Respondent has disciplined and terminated other employees for insubordinate behavior, the records also support General Counsel's assertions

[10] R. Exh. 34.

[11] R. Exh. 34, "being loud and disruptive, using obscene and insulting language, refusing assignments, and arguing with his supervisor." In one instance, the employee called some of his coworkers "bitches" and some of his patients "redneck hillbillies." On another occasion, the employee became involved in an argument with a patient and refused to go back into the patient's room. In October 2000, the employee refused a charge nurse's assignment and was suspended.

[12] R. Exh. 34.

[13] R. Exh. 34, p. 116.

that Respondent has tolerated similar or worse conduct without comparable discipline. As indicated by the records discussed above, employees have repeatedly violated Respondent's standards of conduct prior to their discipline. At the time of Witzleb's discharge, she had been an employee of The Med for over 16 years. It is undisputed that she had never received any prior discipline for the offense for which she was allegedly discharged. In its 1999 decision in *Avondale Industries,* 329 NLRB 1064 (1999), the Board noted that an employer's *Wright Line* burden is not met simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate treatment. The respondent must prove that the instances of disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general consistent past practice. In the instant case as in *Avondale*, Respondent has not met the burden of establishing that it would have taken the challenged disciplinary action even in the absence of union activity. As in *Avondale,* the evidence shows that Respondent may, or may not have similarly disciplined other employees as the record of disciplinary action is mixed. Even though Respondent may have disciplined other employees for similar conduct, Respondent has failed to show that it would have terminated Witzleb absent her union activity. *Pacific FM Inc.*, 332 NLRB 771, 772 (2000).

Respondent's explanation for Witzleb's discharge was presented through the testimony of Respondent's director of surgical services. Duncan testified that during the March 27, 2003 interview, Witzleb admitted that Moore's comments made her angry and she had returned to the OR and questioned Moore about her comments. Duncan testified that Witzleb admitted that she had told Moore that she would not do another elective case and that she was going to eat her lunch or go home. Duncan also testified that Witzleb went on to say, "that was what she had told the charge nurse" and what she was also telling Duncan. Duncan testified that Witzleb was insubordinate to not only Moore but also to Duncan during the March 27 meeting.

Witzleb testified that when she spoke with Moore on February 15, she told her that she needed to check her blood sugar, take some insulin, and eat something before she did another elective surgery. She does not deny that she also added, "Or I can go home." In contradiction to Duncan however, Witzleb explained that when she made the March 27 statement to Duncan, "I've told her this, and I'll tell you this too," she had simply repeated to Duncan her previous statement to Pulley that if the TOR continued to operate as an elective OR, it needed to be staffed like one with designated lunch and breaktimes. Both Pulley and Raburn were present during the March 27 meeting with Duncan and Witzleb. Neither corroborated Witzleb's alleged admissions during the interview or her additional insubordination to Duncan during the meeting. I find Witzleb to be a more credible witness than Duncan. She admitted that when she spoke with Moore, she had added "or I can go home" and she described herself as being a "smart ass" in making the statement. Her admissions support her overall credibility. Without corroboration from Raburn and Pulley, I find Witzleb's testimony concerning both the February 15 conversation and the March 27 interview to be more credible than Duncan's testimony. Duncan's attempt to expand the extent of Witzleb's insubordination is self-serving and suspect. Finding no credible evidence of Witzleb's alleged insubordination to Duncan on March 27, I must infer that the real motive for Witzleb's discharge is unlawful, especially when the surrounding evidence tends to reinforce that inference. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The Board has consistently held that shifting reasons or defenses for an employee's termination of an employee establish a pretextual reason and under such circumstances an employer fails to meet its *Wright Line* burden. *American Ambulette Corp.*, 312 NLRB 1166, 1169 (1993).

Based on all of the foregoing, I find that General Counsel's prima facie case establishing unlawful motivation stands unrebutted. Accordingly, while Witzleb's conduct may have been arguably inappropriate with Moore, I nevertheless conclude that Respondent terminated Witzleb because of her union activity in violation of Section 8(a)(3) of the Act.

C. Rules Prohibiting Employee Communications

1. Complaint paragraph 9

Complaint paragraph 9 alleges that about March 27, 2003, Respondent, by Linda Duncan, Susan Raburn, and Lynda Pulley threatened an employee that she was prohibited from discussing disciplinary matters with nonsupervisory coworkers. Witzleb testified that when she spoke with Duncan, Raburn, and Pulley on March 27, Duncan told her that she was held to a confidentiality rule that prohibited her from discussing her suspension pending investigation with any of her coworkers. When Witzleb questioned the existence of such a rule, Duncan produced the policy manual and directed her to a specific section. Duncan's notes from her meeting with Witzleb include the following: "I also advised her not to discuss this investigation or any disciplinary action with her coworkers, with the exception of HR employees, members of her management team, and Administration." Duncan also testified that when she spoke with Witzleb, she told her not to talk with others about her suspension pending investigation. When asked why she did so she explained:

> Well, she was being suspended pending an investigation. And we still needed to conduct an investigation. If she were to go out into the unit and you know, talk to co-workers and other people who may or may not have been involved in the case, had the potential to disrupt our ability to conduct an adequate investigation.

Duncan further explained that if Witzleb had talked with coworkers who may have been involved in the investigation, she could have "clouded their judgment or recollection, or altered what they might have told us during the course of an investigation had she gone out and talked about it."

2. Complaint paragraph 10

Paragraph 10 of the complaint alleges that at all times material, Respondent, by its written personnel manual, has maintained the following rules:

> obtaining or disclosing information concerning * * * employees, * * * when not properly authorized by the hospital, is prohibited. This includes, but not limited to the following:

(a) Information from * * * employee * * * hospital records and data

(b) Information relating to employee discipline, performance evaluation, or other matters of a personal nature

(c) Personal or professional information concerning medical staff or other professional staff members

In its answer, Respondent admits that the language included in paragraph 10 of the complaint is a portion of Respondent's personnel manual, form no. 8348.006B(09/93).

3. Complaint paragraph 11

Complaint paragraph 11 alleges that at all material times, Respondent, by publication of its code of conduct-legal compliance program, has maintained the following rule:

> Government investigations: * * * Any employee who receives an inquiry, subpoena, or other legal document regarding business of The MED from the government, should notify the Compliance Officer or Corporate Counsel prior to discussing the matter with the government official.

In its answer, Respondent admits that the language included in complaint paragraph 11 is a portion of Respondent's code of conduct-legal compliance program.

4. Complaint paragraphs 12 and 13

Complaint paragraph 12 alleges that at all material times, Respondent has maintained a written confidentiality agreement that states as follows:

> (a) I agree not to disclose or discuss any * * * human resources, payroll, * * * and/or management information with others, including friends or family, who do not have a need to know.
>
> (b) I agree not to discuss * * * human resources, payroll, * * * or management information where others can overhear the conversations.

Complaint paragraph 13 alleges that since about January 2003, the precise date being unknown to the General Counsel at this time, Respondent has required its employees to sign the confidentiality agreement referred to in paragraph 12.

In its answer, Respondent admits that the language included in complaint paragraph 12 is a portion of the "Shelby County Health Care Corporation Confidentiality Agreement." Respondent further admits that it has required persons whom it employs to sign this agreement.

5. Conclusions concerning Respondent's communication rules

It is well settled that Section 7 of the Act extends protection to employees' discussions regarding wages, hours, and conditions of employment. *The Loft*, 277 NLRB 1444, 1461 (1986). As the Board stated in *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1041 (1991), citing *Root Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."

The standard for analyzing workplace rules that prohibit or limit disclosure is found in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), where the Board found that the appropriate inquiry is whether the rules would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board found that where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

It is undisputed that Respondent's personnel manual prohibits "obtaining or disclosing information concerning patients, employees, the hospital, or others, when not properly authorized by the hospital." The manual provides that information prohibited from disclosure includes "Information relating to employee discipline, performance evaluation, or other matters of a personal nature." The manual further prohibits disclosing "Personal or professional information concerning medical staff or other professional staff members" as well as "information from patient, employee, or other hospital records and data." Respondent's personnel manual also provides that any employee who makes an unauthorized disclosure of confidential information will be subject to disciplinary action up to immediate termination. In a recent decision, the Board analyzed an employer's communication rules in determining whether the rules in question unlawfully prohibited employees from engaging in the Section 7 right to discuss terms and conditions of employment. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 116 (2004). The Board revisited its prior decisions in *University Medical Center*,[14] *Flamingo Hilton-Laughlin*,[15] and *IRIS U.S.A., Inc.*,[16] where the Board determined that the communication rules were so broadly stated that employees could reasonably construe them to prohibit discussions of wage and working conditions. In its *Double Eagle Hotel and Casino* decision, the Board noted that unlike the previous cases where the language could be construed to prohibit discussions of wages and working conditions, the communication rule specifically prohibited disclosing confidential information that included "disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees" and included a threat of disciplinary action if the rule were violated. The Board concluded that the rule on its face and on threat of discipline expressly prohibits the discussion of wages and other terms and conditions of employment infringing on Section 7 rights in violation of Section 8(a)(1). In the instant case, Respondent's confidentiality provision of its personnel manual equally infringes on employees' Section 7 rights and is violative of Section 8(a)(1) of the Act.

It is also without dispute that Respondent enforces the provisions of the confidentiality section of its personnel manual as evidenced by Duncan's warning to Witzleb on March 27, 2003. Duncan's rationale for imposing the restriction was the alleged concern that in talking with other employees, Witzleb could interfere with Respondent's investigation and could "cloud" other employees' judgment and recollection. As noted by the judge in

[14] 335 NLRB 1318 (2001).
[15] 330 NLRB 287 (1999).
[16] 336 NLRB 1013 (2001).

Westside Community Mental Health Center, 327 NLRB 661 (1999), such a prohibition also restricts employees from possibly obtaining information from their coworkers that might be used in their defense. Even though there was no explicit penalty for violating the prohibition against employees' discussing their own discipline with other employees, the Board affirmed the judge and found the instruction sufficient to tend to inhibit employees from engaging in protected concerted activity.

It is also undisputed that Respondent requires its employees to sign a confidentiality agreement in which the employee agrees not to disclose or discuss any patient, human resources, payroll, financial, research and/or management information with others, including friends or family, who do not have a need-to-know. Certainly, an employer that has responsibility for patient care has a moral and legal responsibility to protect the confidentiality of its patients. The confidentiality agreement however, does not limit the prohibited disclosure to the types of information that are typically considered "confidential" or solely within the purview of patient or administrative confidentiality, but includes a prohibition against disclosing or discussing information about payroll, human resources, or other management information. By its very wording, the prohibition pertains to wages and working conditions. I conclude that employees would reasonably read the confidentiality section of Respondent's personnel manual as well as the confidentiality agreement as prohibiting them from disclosing information concerning terms and conditions of employment. Accordingly, I find the maintenance of these confidentiality rules to infringe upon employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

It is also undisputed that Respondent's code of conduct-legal compliance program provides that "any employee who receives an inquiry, subpoena, or other legal document regarding business of The MED from the government, should notify the Compliance Officer or Corporate Counsel prior to discussing the matter with the government official." The Board has determined that maintaining a rule prohibiting employees from providing information or giving testimony to Governmental agencies without the employer's approval is violative on its face. See *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003).

Accordingly, as discussed above, I find that Respondent's communication rules as alleged in complaint paragraphs 9, 10, 11, 12, and 13 are violative of Section 8(a)(1) of the Act.

D. Whether Respondent Denied PTO to Wood Because of her Contact With the NLRB

General Counsel alleges that Respondent denied Becky Wood 24 hours paid sick leave because she participated in investigations or gave testimony under the Act. Section 8(a)(4) of the Act prohibits an employer from discriminating against an employee because he or she filed charges or for giving testimony under the Act. The Board has found that the purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947). In its decision in *NLRB v. AA Electric Co.*, 405 U.S. 117 (1972), the Supreme Court found that Section 8(a)(4) applies not only to filing charges or testifying at a formal hearing, but also to giving affidavits during an investigation.

The analysis used to determine whether Respondent denied Wood 24 hours of paid sick leave because of her contact with the Board in violation of Section 8(a)(4) of the Act is the same as that used in analyzing potential violations of Section 8(a)(3) of the Act. *Freightway Corp.*, 299 NLRB 531 fn. 4 (1990). Using the analysis set forth in *Wright Line*, 251 NLRB 1093 (1980), the General Counsel is charged with the responsibility of making a prima facie showing sufficient to support the inference that Wood's protected conduct was a "motivating factor" in Respondent's decision to deny her 24 hours of paid sick leave. A prima facie case is made out where the General Counsel establishes protected activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging protected activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993). As discussed below, I do not find that General Counsel has established the requisite prima facie case as required by the Board in *Wright Line.*

While Wood testified that she gave a telephone affidavit to the Board in May 2003, there is no evidence that Respondent had any knowledge of this affidavit prior to its failure to pay her the 24 hours of sick leave pay. The record does reflect however, that Wood communicated the Pulley conversation to the Board. By letter dated May 8, 2003 Field Attorney Mohns informed Respondent of the allegation that Pulley had instructed an employee that she was not "under any circumstances to talk to the NLRB investigator who had contacted her." By letter dated May 28, 2003, Respondent's counsel informed the Board's Regional Office that Wood contacted Pulley to inquire what she should do in response to the Board's attempt to contact her. Thus, it is apparent that Respondent knew that Wood was the employee involved in the allegation concerning Pulley. Based upon the above undisputed facts, both the protected activity and Respondent's knowledge of that activity is established for purposes of the *Wright Line* analysis. It is also undisputed that Wood did not receive pay for her first 24 hours of sick leave.

It is the absence of an inference of animus or discriminatory motivation however, that prevents General Counsel from establishing the requisite prima facie case. In paragraph 8 of the complaint, General Counsel alleges that Respondent, acting through Pulley, threatened an employee with unspecified reprisal if the employee responded to an inquiry from the National Labor Relations Board. The only record evidence of any conversation about an employee's contact with the National Labor Relations Board was Wood's testimony concerning her conversation with Pulley. Wood testified that she approached Pulley and asked if Pulley had any idea why the "Labor Board would be trying to contact" her. Wood testified: "She said, you don't need to talk to the Labor Board, you need to go across the street to administration and talk to corporate legal." As discussed above, Pulley's statement appears to be consistent with language in Respondent's code of conduct-legal compliance program requiring an employee to notify Respondent's compliance officer when the employee receives an inquiry, subpoena, or other legal document from the Government prior to discussing the matter with the Government official. While I find the maintenance of this rule to be violative of the Act as well as Pulley's enforcement of the rule, I do not find Pulley's statement to be a threat as alleged in the complaint.

By Wood's own testimony, Pulley simply reminded Wood of the existing rule concerning contact with Government officials. Thus, while the statement may be an enforcement of a violative rule, it does not support an inference of animus nor do I find it to be a threat as alleged in paragraph 8 of the complaint.

The most significant evidence that diminishes an inference of animus is the lack of disparity in Respondent's actions. Wood admits that under Respondent's PTO policy, PTO may be denied where the absence causes undue hardship. Wood further admits that Respondent has not denied PTO to Ashburn, Witzleb, Kimmons, and Long who are active union supporters. Ashburn, whose photograph was displayed on the Union's organizing leaflet, testified that the first 24 hours of her May 2003 extended sick leave was paid from her PTO bank and she lost no pay. Kristina Johnson took extended sick leave later in May and during the first part of June. Although she timely notified Respondent in advance, she was denied pay for the first 48 hours of her absence. Both Pulley and Britton told her that because she requested leave during a time of short staffing, she was denied full pay. Thus, Respondent's denial of full pay to Wood is consistent with the actions taken with Johnson. Additionally, the record reflects that Respondent has not denied full pay to other employees who engaged in as much or more protected activity than Wood. Accordingly, the lack of accompanying animus, the lack of disparate treatment, and there being no other evidence of a discriminatory motive leads me to find that General Counsel has not established a prima facie case under the *Wright Line* analysis and I find no violation of Section 8(a)(4) in Respondent's failure to pay Wood for 24 hours of her sick leave.

E. Respondent's November 26, 2002 Memorandum

Complaint paragraph 7 alleges that since about November 26, 2002, Respondent posted at its facility a memorandum accompanied by a resolution of Respondent's board of directors stating: "there will be no counting of cards, election process or recognition of a union for nurses" and stating that Respondent "will not recognize union representation of registered nurses at The Regional Medical Center at Memphis through informal or any other means." General Counsel alleges that Respondent's posting was in violation of Section 8(a)(1) of the Act.

Respondent's memorandum additionally explains that its decision not to recognize the Union is based upon its belief that it is not covered by the National Labor Relations Board and the fact that there is no Tennessee law requiring Respondent to recognize and deal with a union for registered nurses. Respondent further stated in its memorandum that its decision not to recognize the Union did not interfere with employees' rights to associate with anyone they wish, including labor unions. I don't find Respondent's November 26, 2002 memorandum to contain any threats or promises and it appears simply to be Respondent's stated opposition to unionization and the rationale for its opposition. Accordingly, I find it to be protected free speech under Section 8(c) of the Act and I shall recommend dismissal of complaint paragraph 7. See *Hancock*, 337 NLRB 1223, 1224 (2002); *Mayfair Midwest, Inc.*, 148 NLRB 1602, 1603 (1964).

CONCLUSIONS OF LAW

1. Shelby County Health Care Corporation d/b/a The Regional Medical Center at Memphis is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The facts of this case warrant Respondent's exemption from Board jurisdiction, as it is a political subdivision.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. Respondent's discharge of Amelia Witzleb is otherwise violative of Section 8(a)(3) and (1) of the Act.
5. Respondent's maintenance and enforcement of its rule prohibiting employees from disclosing information about themselves and other employees is otherwise violative of Section 8(a)(1) of the Act.
6. Respondent's maintenance and enforcement of its rule requiring employees to notify its compliance officer or its corporate counsel prior to discussing a matter with a Government Official is otherwise violative of Section 8(a)(1) of the Act.
7. Respondent's maintenance and enforcement of its rule requiring that employees adhere to and sign a written confidentiality agreement is otherwise violative of Section 8(a)(1) of the Act.
8. Respondent did not otherwise engage in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent is exempt from the Board's jurisdiction, no remedy is recommended even though certain conduct as alleged is otherwise violative of Section 8(a)(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.